

June 6, 2008

**Via ECF**

Hon. Joseph C. Spero  
United States District Court  
Northern District of California  
Courtroom A, 15<sup>th</sup> Floor  
450 Golden Gate Ave.  
San Francisco, CA 94102

Re: *Sterling Merchandising, Inc. v. Dreyer's Grand Ice Cream, Inc.*,  
USDC Case No. 08-80108 SBA (JCS)  
File No. 080369-0001

Dear Judge Spero:

After conducting an in-person meet and confer and failing to reach an agreement, the parties submit this Joint Letter pursuant to the Stipulation and Order Modifying May 19, 2008 Order (Docket No. 6) regarding Respondent Dreyer's Grand Ice Cream, Inc.'s (Dreyer's) compliance with one remaining specification of Petitioner Sterling Merchandising, Inc.'s (Sterling) Subpoena for market studies documents and related deposition topics.

**Petitioner Sterling's Position**

**Background and Matters that Remain in Dispute**

On January 5, 2006, Sterling, an ice cream distributor located in San Juan, Puerto Rico, filed a complaint against Nestlé S.A. and its Puerto Rican subsidiaries, Nestlé P.R. and Payco Foods Corporation. The Amended Complaint alleges that defendants used anti-competitive practices to attempt to monopolize ice cream distribution in Puerto Rico in violation of antitrust laws. *See* Exhibit A.

Sterling is the exclusive Puerto Rican distributor for Edy's brand ice cream which is manufactured by Dreyer's, the respondent in this matter. In 2003, Nestlé S.A., through its subsidiaries, acquired an ownership interest in Dreyer's and obtained complete ownership as of January 18, 2006. The Amended Complaint alleges that Dreyer's unfairly raised the price of Edy's to Sterling after Nestlé S.A. acquired ownership in Dreyer's. *See id.* at ¶¶ 34, 35.

On August 29, 2007, Sterling served Dreyer's counsel with an Amended Subpoena pursuant to Fed. R. Civ. P. 30(b)(2)(B) & (C),<sup>1</sup> which included, *inter alia*, Request No. 5 for "market research reports or analysis." *See* Exhibit B. To date, despite Sterling's repeated informal requests, Dreyer's has not complied with this document request.<sup>2</sup> Dreyer's designated

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<sup>1</sup> Dreyer's counsel in this matter also represents Nestlé S.A. and other Nestlé affiliate defendants in the litigation pending in Puerto Rico.

<sup>2</sup> Sterling's Notice of Motion and Motion to Compel concerned compliance with Document Request Nos. 5 and 6 and related deposition topics. Counsel reached a compromise regarding Request No. 6 on May 28, 2008.

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William Collette as its deponent for this deposition, and Sterling deposed Mr. Collette on November 14, 2007. Mr. Collette provided limited information falling under topics regarding market research reports or analysis, but did testify that Dreyer's had undertaken customer behavior, price elasticity, and brand loyalty studies. *See* Exhibit C (Collette November 14, 2007 Depo. Tr. at 25-26; 103-08).

### **Parties' Meet and Confer Efforts to Resolve this Dispute**

Counsel for Sterling and Dreyer's have met and conferred to resolve this matter on August 16 and August 28, 2007, March 27, 2008 and April 11, 2008 but failed to reach an agreement. After this Court's May 23, 2008 Order, Sterling proposed that lead counsel meet and confer by telephone to attempt to resolve pending issues. On May 28 and May 29, 2008, counsel met and conferred via telephone and exchanged emails, copies of which are enclosed as Exhibit D. While counsel resolved one issue, no agreement was reached regarding Document Request No. 5. On May 30, 2008, counsel met and conferred in person in Madison, Wisconsin, but were unable to resolve the dispute at that time.

### **Sterling's Position and Proposed Resolution**

Dreyer's produced four pages with Puerto Rico market share data responsive to Request No. 5, claiming that non-Puerto Rico specific documents were beyond the scope of Sterling's claims, not relevant to this litigation, and unduly burdensome. Dreyer's has refused to provide market studies and analysis based product sales in the United States. In March 21, 2008 correspondence, Sterling narrowed the request to "marketing reports and analysis regarding Edy's brand products, but declined...geographic limitations...[and] to the final reports and analysis...not...underlying data, correspondences or email." *See* Exhibit E.

On May 29, 2008, petitioner agreed to limit the production to Dreyer's Marketing Division and modified the request to read as follows:

Quantitative and qualitative market research reports or analysis regarding ice cream products (including Edy's), such as, but not limited to, syndicated research and other market analysis and data purchased from third parties, studies regarding brand loyalty, market simulation, ~~product concept, media plan, market segmentation,~~ price elasticity, consumer perceptions and behavior analyses of non-price promotional efforts (in-store display and advertising), temporary price reductions, ~~and other market analyses~~ for Puerto Rico and the United States and for Hispanic customers in the United States.

*See* Exhibit D, at 3-5. At that time petitioner's counsel also limited the time period and provided further clarification regarding the type of market research and reports being sought. *See id.* at 4-5.

Petitioner submits that market studies and analysis about customer behavior regarding the purchase of Edy's ice cream are directly relevant to market definition and effects of defendants' alleged anti-competitive conduct. The documents sought are of substantial importance because there are many overlapping aspects between Puerto Rico and mainland ice cream retail markets: (1) retail grocery stores offer take home ice cream from retail freezer displays; (2) Edy's

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competes with other major U.S. brands (ice cream is no longer manufactured in Puerto Rico, but imported primarily from United States manufacturers); (3) temporary price reductions; and (4) in-store promotional programs are used to encourage sales. Edy's is Sterling's primary brand. Information regarding customer behavior and price elasticity studies will be particularly relevant for expert economic analysis in the underlying action.

Information about markets outside the relevant market is discoverable in antitrust actions. *See United States v. Dentsply Int'l, Inc.*, 2000-1 Trade Cas. (CCH) ¶ 72, 919 (D. Del. 2000); *Kellam Energy, Inc. v. Duncan*, 616 F. Supp. 215, 219 (D. Del. 1985) (stating that "regardless of how [the] geographic market is eventually defined in the action, the boundaries of that market do not set the geographic limit of discovery."). Under well recognized legal standards, the burden identified by Respondent does not outweigh petitioner's right to obtain relevant information that may lead to the discovery of admissible evidence. *See Gonzales v. Google*, 234 F.R.D. 674, 679 (N.D. Cal. 2006) Dreyer's is not a party in the litigation in Puerto Rico, but is wholly owned by defendant Nestlé S.A. The Amended Complaint implicates Dreyer's in the anti-competitive conduct. Thus, Dreyer's is not an unrelated third party respondent to a Rule 45 Subpoena. Consequently, petitioner respectfully submits that respondent should produce responsive documents and designate a person to testify regarding same.

### **Third Party Dreyer's' Position**

Dreyer's, a non-party to the underlying litigation by every legal definition, has complied with or reached a compromise on a massive quantity of requested discovery over the past ten months. The only issue that remains is a *portion* of a *single* remaining document specification originally contained in a Rule 45 subpoena issued nearly a year ago. Contrary to the tenor of Sterling's remarks, Dreyer's has been more than cooperative and forthcoming in the discovery process. Dreyer's compliance with Sterling's discovery requests over the past ten months has required a monumental effort involving two in-house counsel, three outside counsel, two paralegals, and numerous Dreyer's employees. All of that discovery was provided at no cost to Sterling. During this period, Dreyer's has reviewed thousands of documents, produced 3,000 pages of documents, proffered a Rule 30(b)(6) corporate designee, and provided three other deposition witnesses at a cost of nearly \$200,000 (over \$110,000 for document review and production and over \$75,000 for deposition preparation and defense).

The remaining portion of that lone document request -- seeking "all marketing reports or analysis" and several other broad and ill-defined categories of documents on a nationwide scale - is a textbook example of the sort of overbroad, unduly burdensome, and attenuated request that led to the discovery reforms of 1991 and 1993. Significantly, even with respect to this one remaining request, Dreyer's has already produced all responsive documents that relate to Puerto Rico, the alleged relevant geographic market and the situs of the underlying litigation. Nothing more should be required given the operative pleadings, the applicable law as discussed below, and the undisputed burden of compliance.

In its Amended Complaint, Sterling alleges that "the relevant geographic market for the claims asserted by Sterling is the Commonwealth of Puerto Rico," or possibly "narrower regions of Puerto Rico, be it municipalities or specific geographic segments."

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(Amended Complaint ¶14)(emphasis supplied). Sterling further maintains that the Puerto Rico ice cream distribution market is drastically different than the U.S. market(s):

In the ice cream business, warehouse systems, in addition to warehousing at minus 20 degrees Fahrenheit, must also have specialized ice cream freezers in the back room of each grocery store. In Puerto Rico, no retail stores possess this kind of system. The average temperature in warehouse freezers in Puerto Rico is zero degrees Fahrenheit, too warm for ice cream. In Puerto Rico, therefore, the only way to enter the market is by setting up a dedicated ice cream direct store distribution (“DSD”) system. A DSD system is a full service system wherein the supplier typically takes the product from the manufacturer to the shelf directly, merchandises it, and takes away credits (bad, damaged or expired products).

(Amended Complaint ¶15f.) A party’s pleadings define the proper scope of discovery under the Federal Rules.

Without question, Sterling’s request for nationwide discovery extends far beyond the relevant geographic market set forth in the pleadings and is drastically out of proportion. **Ice cream sales in Puerto Rico account for less than one tenth of one percent of Dreyer’s total ice cream sales**, yet plaintiff seeks documents covering the entire United States. When pressed, Sterling’s counsel could not explain how consumer brand loyalty or lack thereof in, for example, Detroit or Duluth, would be at all useful in a case limited to distribution practices in Puerto Rico. Sterling’s hope that something useful might turn up in discovery is not a sufficient justification to warrant such a sweeping and intrusive request, particularly when directed at a third party. *See, e.g., Beinin v. Center for the Study of Popular Culture*, 2007 WL 832962, at \*2, \*5 (N.D. Cal. Mar. 16, 2007)(“even if [the discovery sought] exists, the Center has made no showing that such disconnected [discovery] would have other than the most tenuous relationship to the issues presented in this action”); *Mr. Frank, Inc. v. Waste Management, Inc.*, 1981 U.S. Dist. LEXIS 11777, at \*7 (N.D. Ill. Mar. 27, 1981)(“ evidence relating to defendants’ operations throughout the Central United States may be probative . . . . However, the slim possibility that this broad discovery may prove fruitful must be balanced against the undeniable expense and inconvenience . . . in producing the documents and information requested”).

Pertinent legal authority recognizes that the sole request at issue is objectionable. The geographic scope of discovery in an antitrust case is appropriately limited to alleged geographic markets affected by the alleged anticompetitive acts. *See, e.g., Heartland Surgical Specialty Hosp. v. Midwest Div., Inc.*, 2007 WL 2668742, at \*10-\*11 (D. Kan. 2007 Sept. 6, 2007)(precluding discovery in antitrust case seeking information for all of Missouri where relevant geographic market was defined as Kansas City area); *Mr. Frank, Inc.*, 1981 U.S. Dist. LEXIS 11777, at \*4-\*7 (interrogatories to party seeking information outside geographic scope of antitrust allegations held unduly burdensome); *In re Fertilizer Antitrust Lit.*, 1979 WL 1690, at \*10-\*11 (E.D. Wash. Sept. 14, 1979)(denying motion to compel and restricting geographic scope of discovery to area of antitrust allegations)(citing additional authority); *William Goldman Theaters, Inc. v. Metro-Goldwyn-Mayer, Inc.*, 54 F.R.D. 201, 201-02 (E.D. Pa. 1971)(denying motion to compel discovery in U.S. on ground plaintiff alleged purely local antitrust claim confined to Philadelphia)(citing additional authority); *Barker v. Jewel Food Stores, Inc. v.*, 2001 WL 35906469, at \*2-\*4 (Ill. Cir. Nov. 2, 2001)(denying motion to compel in antitrust case where plaintiff sought discovery outside of geographic area alleged / area where parties

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competed)(surveying numerous cases). Given this extensive authority, Dreyer's is on solid ground regarding its relevancy objection. Moreover, the cases relied upon by Sterling are inapposite.<sup>3</sup>

Plaintiff's supposed effort to "narrow" its sweeping request through minor editing does not ameliorate the fundamental problems of overbreadth, burdensomeness, and lack of relevancy. The heavy burden to comply is palpable and not in dispute. Compliance would require Dreyer's to search through both the paper *and* electronic files of approximately seventy five employees. Each of these seventy five employees maintains electronic records in at least the form of: (i) an email account on the Dreyer's server; (ii) personal or .pst files; (iii) data saved on the employees' individual hard drive; and (iv) data saved on a shared computer drive. Within the shared drive, there are approximately fifty different shared folders. There is no standard for labeling documents of the sort requested at Dreyer's. As a result, searching for the information sought in Request No. 5 on a nationwide basis would require Dreyer's to open virtually every electronic file to determine "responsiveness" (including verifying the date of each document and the substantive content). Thus, Sterling's purported effort to "narrow" the request has not mitigated the extreme burden Sterling seeks to impose on Dreyer's.

Though plaintiff asserts that the foregoing burden is not great, plaintiff is unwilling to bear the cost of that burden. This is the best evidence that the burden is indeed too extreme to justify compliance with the request. Compounding the problem is the fact that there is little downside for plaintiff to push the limits of discovery beyond proper bounds. Given the foregoing, Dreyer's respectfully submits that the burden of discovery compliance on a non-party has already far exceeded legal bounds, and the request to compel yet further discovery of national scope should be denied.

Very truly yours,  
/s/ David J. Gilles

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On behalf of Sterling Merchandising, Inc.

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<sup>3</sup> Sterling cites *Google*, 234 F.R.D. 674, a non-antitrust case with no alleged geographic market at issue and thus, is seemingly impertinent. Even so, *Google* held that where, as here, the information sought is "trade secret or confidential commercial information from a non-party," Sterling must further demonstrate "that the requested discovery is **relevant** and **essential** to a judicial determination of the case." *Id.* at 884, 885 (emphasis supplied). Aside from conclusory allegations, Sterling has not satisfied *Google's* mandate.

The *Kellam* and *Dentsply* cases Sterling cites stand only for the proposition that discovery outside the alleged relevant geographic market may be obtained when the information sought relates to *liability* issues, i.e., "to establish design or pattern to monopolize or intent to conspire in violation of the antitrust laws." *Kellam*, 616 F. Supp. at 217-18, 219; *Dentsply*, 2000-1 Trade Cas. (CCH) ¶ 72, 919. In contrast, Sterling supposedly seeks the information at issue for market definition purposes, thus rendering the *Kellam* and *Dentsply* reasoning inapplicable.

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/s/ Carmine R. Zarlenga (with permission)

Carmine R. Zarlenga

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On behalf of Dreyer's Grand Ice Cream, Inc.

Enclosures

cc: All Counsel (via electronic mail)

**PROOF OF SERVICE**

**Re: STERLING MERCHANDISING, INC., v. DREYER'S GRAND  
ICE CREAM, INC.  
Case No. 08-80108 SBA (JCS)**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Zelle, Hofmann, Voelbel, Mason & Gette LLP, 44 Montgomery Street, Suite 3400, San Francisco, CA 94104.

On June 6, 2008, I served the within document(s) described as:

1. JOINT LETTER BRIEF TO HONORABLE JOSEPH C. SPERO

on the interested parties to this action as follows:

Carmine Zarlenga	zarlengac@howrey.com
Erik Koons	koonse@howrey.com
Seth Erbe	seth.erbe@indianowilliams.com
Luis Oliver	loliver@fgrlaw.com

☒ (BY ELECTRONIC MAIL) I caused such document(s) to be emailed to the offices and/or to attorneys of offices of the above named addressee(s).

Executed on June 6, 2008, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/Monica J. Steele

Monica J. Steele

# EXHIBIT A



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

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STERLING MERCHANDISING, INC.,

Plaintiff,

v.

Civil No. 06-1015 (SEC)

NESTLÉ, S.A.; NESTLÉ PUERTO RICO, INC.;  
and PAYCO FOODS CORPORATION,

JURY TRIAL DEMANDED

Defendants.

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**AMENDED COMPLAINT**

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**TO THE HONORABLE COURT:**

**APPEARS NOW** Plaintiff Sterling Merchandising, Inc. ("Sterling"), by and through the undersigned counsel, brings this action against defendants Nestlé, S.A. and Nestlé Puerto Rico, Inc. (collectively, "Nestlé") and Payco Foods Corporation ("Payco"), for damages and injunctive relief under the antitrust laws of the United States and the Commonwealth of Puerto Rico, and hereby demands a trial by jury. In support thereof, Sterling alleges as follows:

**NATURE OF THE ACTION**

1. This action arises out of Nestlé and Payco's anticompetitive, collusive and monopolistic practices in the conduct of trade or commerce, specifically those acts or practices that they intended to use, did use, and continue to use to prevent and destroy competition and acquire and/or maintain monopoly power in the market for ice cream distribution in Puerto Rico.

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2. Through the use of exclusionary contracts, a series of anticompetitive acquisitions, and related exclusionary conduct, Nestlé and Payco have unlawfully acquired a dominant market share of the relevant market and suppressed competition in the relevant market, thereby injuring consumers and Sterling.
3. Sterling seeks to recover for the injury to its business or property resulting from the defendants' anticompetitive and monopolistic practices. Sterling also seeks treble damages, injunctive and declaratory relief, and costs, including reasonable attorneys' fees.

#### **JURISDICTION AND VENUE**

4. Pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, this action is for damages and injunctive relief for violations of Sections 1, 2 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 2, 3 and Section 3 of the Clayton Act, 15 U.S.C. § 14. This Court has jurisdiction over this civil action pursuant to 15 U.S.C. §§ 26 and 28 and 28 U.S.C. §§ 1331, 1337(a).
5. Supplementary jurisdiction is invoked for certain state-based claims, in particular the Puerto Rico Anti-Monopoly Act, 10 P.R. Laws Ann. §§ 257-276, since the factual background for their application is virtually identical to the facts of the federal claims giving original jurisdiction to this Court.
6. Venue is proper in this district pursuant to 15 U.S.C. §§ 15, 22, 26 and 28 U.S.C. §§ 1391 because (a) at least one of the defendants is doing business within this

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district, and (b) it was this judicial district in which a substantial part of the events or omissions alleged herein occurred.

#### **TRADE AND COMMERCE AFFECTED**

7. At all relevant times hereto, at least some of the defendants were engaged in the distribution and sale of ice cream products in Puerto Rico.
8. The defendants' business activities that are the subject of this complaint were within the flow of and substantially affected trade and commerce in Puerto Rico, between Puerto Rico and various states, and among the several states.

#### **THE PARTIES**

9. Sterling is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico, and having its principal place of business at "C" Street, Lot 29, Luchetti Industrial Park, Bayamón, Puerto Rico 00961.
10. Upon information and belief, defendant Nestlé, S.A. is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its principal executive offices located at Avenue Nestlé 55, CH-1800, Vevey, Switzerland. Nestlé, S.A. owns 100% of the shares of Nestlé Puerto Rico, Inc. and Payco. Nestlé, S.A. is the largest food company in the world. With its recent acquisition of Dreyer's Grand Ice Cream Holdings, Inc. and Dreyer's Grand Ice Cream, Inc. (hereinafter, "Dreyer's"), through its subsidiaries, Nestlé, S.A. has also become one of the two dominant ice cream companies in the world.

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11. Upon information and belief, defendant Nestlé Puerto Rico, Inc. is a corporation wholly owned, controlled and organized by Nestlé, S.A. under the laws of the Commonwealth of Puerto Rico. Nestlé Puerto Rico, Inc. has its principal place of business at Carretera Estatal Num. 869, Km. 3.4, Centro de Distribucion del Norte, Barrio Palmas, Cataño, Puerto Rico 00962. Nestlé Puerto Rico, Inc. is merely a business conduit of Nestlé S.A.'s business goals, including the monopolization of the ice cream market in Puerto Rico. Nestlé S. A. makes all the decisions on behalf of Nestlé Puerto Rico, Inc. and is in reality its alter ego.
12. Upon information and belief, defendant Payco is a corporation organized under the laws of the Commonwealth of Puerto Rico, with its principal place of business in Street Number 3, Lots 10 and 11, Hato Tejas Industrial Park, Bayamón, Puerto Rico 00956.

**NESTLÉ'S MONOPOLY POWER IN THE RELEVANT MARKET**

**The Relevant Product Market**

13. The relevant product market is the market for the distribution of ice cream products, and possibly narrower submarkets therein.

**The Relevant Geographic Market**

14. At all material times, the relevant geographic market for the claims asserted by Sterling is the Commonwealth of Puerto Rico. Relevant geographic retail markets for the sale of ice cream products exist in narrow regions of Puerto Rico, be it municipalities or specific geographic segments, but the defendants' degree of

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dominance would not vary much in these submarkets from its overall dominance in Puerto Rico generally.

### **Entry Barriers**

15. There are significant barriers to entry into the relevant market in this case:
- a. In the ice cream business, warehouse systems, in addition to warehousing at minus 20 degrees Fahrenheit, must also have specialized ice cream freezers in the back room of each grocery store. In Puerto Rico, no retail stores possess this kind of system. The average temperature in warehouse freezers in Puerto Rico is zero degrees Fahrenheit, too warm for ice cream. In Puerto Rico, therefore, the only way to enter the relevant market is by setting up a dedicated ice cream direct store distribution (“DSD”) system. A DSD system is a full service system wherein the supplier typically takes the product from the manufacturer to the shelf directly, merchandises it, and takes away credits (bad, damaged or expired products). In markets characterized by DSD systems, like this one, new distributors incur the substantial risk of introducing new products instead of the retailers.
  - b. The sunk capital necessary to compete in this market is considerably higher than most distribution markets. Sunk capital is defined as expenditures that cannot be recovered in whole or in part if the entrant exits the market. Any new competitor in the relevant market would need expertise, extremely low temperature specialized trucks for storing products at minus 20 degrees Fahrenheit, and substantial capital for display equipment and ancillary equipment.
  - c. Building routes dense enough to support the high fixed cost of the equipment needed is an especially high barrier to entry given the numerous exclusive and exclusionary contracts Nestlé and Payco have put in place with retailers throughout Puerto Rico. In order to be able to compete, the routes need a dense enough customer base so that a competitive amount of stops can be attained. This is time-consuming and very expensive in that it creates substantial sunk costs for new entrants into DSD system markets. It would take a new entrant a significantly greater time and expense than incumbent firms to enter markets with these characteristics.
  - d. There are a limited number of ice cream brands for companies like Sterling to distribute because two international corporations, Unilever and

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Nestlé, dominate the ice cream market. Only a handful of regional brands have been able to keep pace with these companies' brands, mostly because Unilever and Nestlé are able to spread the costs of launching a new product across a very broad distribution base.

- e. All attempts at entry into the relevant product market since at least 1993 have failed, or are currently in the process of failing.
- f. The defendants' large market share, coupled with their exclusive and exclusionary contracts with retailers, make it virtually impossible for a new entity to enter the relevant market successfully. One relatively new entrant to the relevant market, Palm Industries, despite having expertise and substantial capital and financing, is struggling. Today, Palm has accumulated a multi-million dollar deficit and has not shipped its merchandise (Blue Bunny) to Puerto Rico for almost 12 months out of the last two years.

**Defendants' Monopoly Power in the Relevant Market**

- 16. Currently, Sterling is the defendants' only viable competitor in the relevant market, and the defendants' market share in the relevant market is overwhelming – approximately seventy (70) percent. This market share percentage does not include the indirect control Nestlé has over Sterling's primary brand, Edy's Grand. Nestlé has acquired the owner of the Edy's brand, Dreyer's, and thus has control over the prices under which Sterling may purchase Edy's ice cream and sell it to others, and has the power to withhold Edy's ice cream to Sterling all together.
- 17. At all material times, the defendants have had and continue to have substantial market power in the relevant market for the distribution of ice cream products.

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**DEFENDANTS' UNLAWFUL, ANTI-COMPETITIVE ACTIVITIES**

18. During the early 1990's, the ice cream market in Puerto Rico had many manufacturers and distributors. Today, that market is controlled by Nestlé and Payco by virtue of their aggressive acquisition strategy and agreements over the past dozen years, vertical exclusive dealing agreements with retailers in Puerto Rico, and related anticompetitive agreements and practices, all of which have continued to the present.

**Defendants' Unlawful Acquisition Strategy**

19. In the early 1990's, the main manufacturers and distributors were Mantecados Jocel (now out of business); Mantecados Payco, Inc., owned by Beatrice Foods (defendant Payco's predecessor); Flav-O-Rich, Inc., owned by Mid-American Dairymen, Inc. (acquired by Payco in 1996); Mantecados Nevada, Inc. (acquired by Nestlé in 1998); Delicatessen Specialties (acquired by Thomas Ward in the 1990's, and later by Nestlé); Suiza Dairy, Inc., ice cream distribution business (acquired by Payco in 1998); and Caribbean Frutti, Inc. (selected assets of which were acquired by Sterling in 2001 and the remainder is defunct).
20. Sterling entered the ice cream distribution business in 1993. Its principal products were Edy's, Ben & Jerry's and Barber's. Sterling is the only successful entrant into the ice cream distribution business in Puerto Rico in at least the past twelve years. Sterling currently distributes Edy's, Turkey Hill, Good Humor, Ben &

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Jerry's, Klondike, Popsicle, Budget Saver Twin Pops and Rich's ice cream in various areas of Puerto Rico.

21. On several occasions, Nestlé has approached Sterling in an effort to buy it. Sterling's owners have declined to sell the company.
22. In 1998, Nestlé acquired control of the second largest DSD system in Puerto Rico through its acquisition of Mantecados Nevada.
23. By 2001, after Nestlé's purchase of Mantecados Nevada, the only competing entities in the relevant product market were Payco, Nestlé and Sterling.
24. Upon information and belief, in early 2002, over a year-and-a-half before its acquisition of Dreyer's, Nestlé began making advances to buy one of its two remaining competitors in the relevant market, Payco.
25. Upon information and belief, in 2002, while Payco and Nestlé were in discussions to combine assets in some manner, Payco and Nestlé were jointly buying space and entering into exclusive and exclusionary contracts with retailers.
26. In June 2003, Nestlé, S.A., through its subsidiaries, purchased 67% ownership of Dreyer's, owners of the Edy's Grand Ice Cream brand (distributed in Puerto Rico by Sterling), thus acquiring the largest DSD system in the United States.
27. The net effect of Nestlé's acquisition of Dreyer's and its popular premium ice cream brand, Edy's, was to make Nestlé the principal supplier of one of its two remaining competitors, Sterling.



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28. Almost at the same time as the acquisition of Dreyer's in June 2003, Nestlé S.A., through Nestlé Puerto Rico Inc., entered into an agreement to buy Payco. In conjunction therewith, Nestlé and Payco signed a Stock Purchase Agreement ("SPA") pursuant to which Payco sold to Nestlé 100% of its stock in two steps. Half of the shares (50%) were sold on or about June 30, 2003, for the sum of Twenty Million U. S. Dollars (\$20,000,000.00). An irrevocable option to buy the remaining half of the shares was granted by Payco; the option price was to be defined on the basis of several values with an arbitration clause in case the parties did not agree on a price.
29. By virtue of Nestlé's acquisition of all shares of Payco, it controls Payco. The acquisition by Nestlé of Dreyer's and Payco gave Nestlé effective control of over eighty (80) percent of the relevant product market in Puerto Rico. (Because Nestlé now controls Payco entirely, "Nestlé" will hereinafter refer to Nestlé and Payco collectively.)
30. Nestlé's acquisition of Payco was analyzed by the Puerto Rico Office of Monopolistic Affairs (hereinafter, "OMA"). OMA determined that Nestlé's acquisition would lead to an anticompetitive market in the relevant product market of ice cream. In an attempt to save the only ice cream factory in Puerto Rico and keep Nestlé active in Puerto Rico, however, OMA issued its consent to the acquisition of Payco by Nestlé under several conditions, among which was the

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requirement that, if Nestlé bought Dreyer's (which it did), it could not strip the Edy's brand distribution rights from Sterling unless certain conditions were met.

31. In 2004, Payco filed suit against Nestlé S.A. and its subsidiaries, Nestlé P.R. and Nestlé Holding, Inc., for their supposed violations in connection with the SPA. *See* U.S. District Court, District of Puerto Rico, Civil Case 05-1628 (JAF). In the suit, Payco alleged, among other things, that Nestlé fraudulently induced Payco to assume operation of the manufacturing facility, which was in precarious physical condition, deficient and inoperative, which led to serious economic loss, reducing Payco's value.
32. In the course of this litigation, the President of Payco, Thomas Ward, alleged that Nestlé, through its misrepresentations with regard to the factory, fraudulently induced OMA to consent to the merger transaction. This lawsuit was settled and dismissed in or around September 2005.
33. After signing the Consent Order with the OMA, Nestlé closed the manufacturing plant in Bayamón and initiated conversations to purchase Sterling without obtaining OMA's prior consent.

**Defendants' Exclusionary Conduct**

34. After OMA's Consent Order had been signed, Nestlé again attempted, this time through coercion, to induce Sterling to sell its business, which would have effectively given Nestlé a complete monopoly over the relevant product market. First, on or about July 2003, Nestlé warned that after its acquisition of Payco,

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things would get more difficult for Sterling, and Sterling should sell the business to Nestlé's partner, Payco. Sterling again declined to sell. Second, on or about December 2003, given Sterling's refusal to sell, Nestlé, through its newly purchased entity, Dreyer's, notified Sterling that Dreyer's prices to Sterling "could rise" due to Nestlé's control of Dreyer's.

35. Upon information and belief, after Nestlé acquired Dreyer's, and therefore the Edy's brand, in 2003, Nestlé increased the price of Edy's to Sterling without a similar rise of prices to distributors in the rest of the United States. Because Nestlé controls and maintains the wholesale prices of other brands with which Sterling must compete, Nestlé's conduct amounts to a price-cost squeeze that adversely impacts competition. This adversely affected Sterling's ability to compete in the relevant market, unlawfully enhanced the defendants' monopoly power, and injured consumers through both increased retail prices and constricted retail options.
36. Upon information and belief, Nestlé has also engaged in exclusive and exclusionary dealings with a substantial percentage of retail stores in the relevant market in order to willfully maintain its monopoly and attempt to destroy Sterling. The following chart illustrates the approximate percentage of shelf space Nestlé possesses in the relevant market as of January 2006:

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Store	Ownership	Volume
Econo	100% Nestlé	6.0 million
Mr. Special	100% Nestlé	1.2 million
Selectos	100% Nestlé	1.0 million
Supermax	100% Nestlé	0.7 million
Coop	100% Nestlé	0.5 million
Ponce Cash and Carry	100% Nestlé	0.5 million
CentroMax	100% Nestlé	1.0 million
El Amal	100% Nestlé	0.7 million
Walgreens	100% Nestlé	2.0 million
Ralph's (& Del Este)	90% Nestlé 10% Sterling	1.5 million
Pitusa	80% Nestlé 20% Sterling	1.5 million
Grande	75% Nestlé 25% Sterling	4.0 million
Pueblo	40% Nestlé 10% Sterling 50% Pueblo	5.0 million
Amigo/Wal-Mart	30% Nestlé 50% Sterling 20% Amigo	6.0 million

37. This landscape has slightly changed as of June 15 2007:

Store	Ownership	Volume
Econo	100% Nestlé	6.0 million
Mr. Special	100% Nestlé	1.2 million
Selectos	100% Nestlé	1.0 million
Supermax	50% Nestlé 50% Sterling	0.7 million
Coop	100% Nestlé	0.5 million
Ponce Cash and Carry	100% Nestlé	0.5 million
CentroMax	100% Nestlé	1.0 million
El Amal	100% Nestlé	0.7 million
Walgreens	95% Nestlé 5% Sterling	2.0 million

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Store	Ownership	Volume
Ralph's (& Del Este)	90% Nestlé 10% Sterling	1.5 million
Pitusa	50% Nestlé 25% Sterling 25% Well's Dairy	1.5 million
Grande	40% Nestlé 30% Sterling 30% Well's Dairy	4.0 million
Pueblo	40% Nestlé 10% Sterling 50% Pueblo	5.0 million
Amigo/Wal-Mart	30% Nestlé 50% Sterling 20% Amigo	6.0 million

38. Upon information and belief, Nestlé began entering into exclusive and exclusionary agreements with retailers throughout Puerto Rico beginning in 1999 and continuing to the present. These agreements had the purpose and effect of limiting competition and adversely impacting consumer welfare generally in Puerto Rico.
39. Upon information and belief, retailers have been induced in some cases to enter into exclusive and exclusionary arrangements with Nestlé because of substantial payments from Nestlé to the retailers that are in many cases unremunerative and, hence, predatory.
40. If Sterling is forced to exit the relevant market completely, Nestlé will be able to recoup its unremunerative payments because of the substantial barriers to entry in the relevant market.

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41. In some regions of Puerto Rico, Nestlé holds 100 percent market share as a result of these exclusionary contracts (*i.e.*, Lares, Vieques, Culebra, Patillas, *etc.*).
42. In those retail stores and local geographic areas where Nestlé controls all or virtually all ice cream distribution and does not face competition due to its actions foreclosing competition from its last remaining competitor, Sterling, consumers are denied the option of purchasing ice cream products of equal or greater quality to Nestlé's offerings at substantially lower prices.
43. Upon information and belief, prior to its acquisition of Payco, Payco and Nestlé conspired with each other to coordinate their offers of payments for shelf space to retailers.

**THE ANTI-COMPETITIVE EFFECTS OF DEFENDANTS' CONDUCT**

44. Nestlé's anticompetitive actions have caused injury to consumers and Sterling. Nestlé's tactics foreclosed the competitive process by preventing rivals, such as Sterling, from competing on price, quality of service and variety of products offered in the relevant market and has prevented new entrants from entering the relevant market. As a result, many consumers do not have the choice to purchase Sterling's brands in many cases or enjoy the competitive benefits Sterling's brands would provide in terms of price, quality and terms of service. In other areas where Sterling has been able to distribute in competition with Nestlé, Sterling's ability to compete has been adversely affected and its distribution costs have been increased by Nestlé's tactics.

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45. Sterling's Edy's Grand and Turkey Hill brands offer a greater variety of choices than any of Nestlé's brands. For example, Edy's offers up to 31 flavors of premium ice cream, over 20 flavors of light ice cream, 6 flavors of sherbet, 8 flavors of no-sugar ice cream, 4 flavors of fat-free, no-sugar ice cream, 6 flavors of frozen yogurt, and 4 flavors of low-carb ice cream, for a total of 79 items to choose from in every sub-category the ice cream market offers. In contrast, the complete Lady Richmond line only has approximately 16 items. The total Nestlé Gold line offers approximately 12 items. Flav-O-Rich offers approximately 5 similar items. The Breyers line typically offers less variety than the Edy's line, while the Edy's line typically sells for, on average, over a dollar (\$1.00) less than Breyers.
46. As a direct result of Nestlé's actions, consumers in many parts of the relevant geographic market are unable to purchase a brand that they clearly prefer.
47. In those geographic markets where Sterling's product is permitted by Nestlé to reach consumers, Nestlé's price-cost squeeze directed at Sterling and other exclusionary activities have adversely impacted consumer welfare and Sterling.
48. Nestlé's overwhelming market share, which it has obtained from a series of anticompetitive acquisitions and exclusionary actions and agreements, allows Nestlé to possess monopoly power to set prices and exclude a variety of competitors and new entrants to the relevant market.

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49. Nestlé's unlawful acquisition and maintenance of a monopoly over the ice cream distribution market in Puerto Rico has caused substantial and irreparable injury to Sterling among others, by way of lost sales and profits, lost good will, loss of investment capital, decreased business value, damage to reputation, lost business opportunities, and loss of future sales.

**First Cause of Action**

**Unlawful Restraint of Trade in Violation of Sections 1 and 3  
of the Sherman Antitrust Act  
15 U.S.C. §§ 1, 3**

50. Sterling incorporates herein by reference as if fully set forth each of the allegations contained in paragraphs 1 through 49, above.
51. Nestlé has participated in conspiracies to unreasonably restrain trade by engaging in: (1) per se illegal horizontal agreements with defendant Payco and other ice cream distributors prior to Nestlé's acquisition of Payco; (2) unlawful combinations with Payco and other ice cream distributors and suppliers; and (3) exclusive, anticompetitive vertical agreements with ice cream retailers.
52. Through the anticompetitive conduct described herein, Nestlé has unreasonably restrained trade in the relevant market in violation of Sections 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 3.
53. As a result of these violations of the Sherman Act, Sterling has been effectively prevented from competing in much of the relevant geographic market at all and,



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even where it has been permitted to compete, from competing fully in much of the relevant market.

54. Sterling's exclusion from competition in the relevant market has substantially adversely affected consumers of these products and competition in general. The defendants' conduct has harmed the competitive process as well as Sterling. Sterling has suffered antitrust injury by reason of the defendants' antitrust violations.
55. As a direct and proximate result of the above-described conduct, Sterling and consumers have suffered and will suffer damages for which the defendants are liable.

### **Second Cause of Action**

#### **Monopolization in Violation of Section 2 of the Sherman Act 15 U.S.C. § 2**

56. Sterling incorporates herein by reference as if fully set forth each of the allegations contained in paragraphs 1 through 55, above.
57. Nestlé possesses monopoly power in the market for the distribution of ice cream products in Puerto Rico, which is a relevant antitrust market.
58. Through the anticompetitive conduct described herein, Nestlé has willfully acquired and maintained its monopoly power in the relevant market. Nestlé has acted with an intent to illegally acquire and maintain its monopoly, and its anticompetitive conduct has enabled it to do so, in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

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59. Through the anticompetitive conduct described herein, Nestlé has, along with other entities, including defendant Payco, willfully conspired to acquire and maintain its monopoly power in this market. Nestlé has acted with a general intent to illegally conspire to acquire and/or maintain its monopoly, and its anticompetitive conduct has enabled it to do so, in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.
60. Nestlé's direct and indirect manipulation, control and maintenance of (1) wholesale prices and (2) the prices charged to retailers unlawfully enhance and maintain defendants' monopoly power, adversely affects Sterling's ability to compete, and injures consumers through both increased retail prices and constricted retail options.
61. Nestlé's anticompetitive conduct described herein occurred in and affected interstate commerce.
62. As a result of Nestlé's violations of Section 2 of the Sherman Antitrust Act, Sterling has been effectively excluded from much of the relevant market.
63. Sterling's exclusion from competition in the relevant market has adversely affected consumers of these products and competition in general. The defendants' conduct has harmed the competitive process as well as Sterling. Sterling has suffered antitrust injury by reason of the defendants' antitrust violations.
64. As a direct and proximate result of the above-described conduct, Sterling has suffered and will suffer damages for which the defendants are liable.

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**Third Cause of Action**

**Attempted Monopolization in Violation of Section 2  
of the Sherman Antitrust Act  
15 U.S.C. § 2**

65. Sterling incorporates herein by reference as if fully set forth each of the allegations contained in paragraphs 1 through 64, above.
66. Nestlé possesses substantial market power in the market for the distribution of ice cream products in Puerto Rico.
67. Through the anticompetitive conduct described herein, Nestlé has willfully attempted to acquire and maintain its monopoly power in the relevant market. Nestlé has acted with a specific intent to attempt to illegally acquire and maintain its monopoly, and its anticompetitive conduct has enabled it to do so, in violation in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.
68. There is a dangerous probability that Nestlé will succeed in its attempt to achieve monopoly power in the relevant market because of its exclusionary conduct.
69. Nestlé's anticompetitive conduct described herein occurred in and affected interstate commerce.
70. As a result of Nestlé's violations of Section 2 of the Sherman Antitrust Act, Sterling has been effectively excluded from the relevant market.
71. Sterling's exclusion from competition in the relevant market has adversely affected consumers of these products and competition in general. The defendants' conduct has harmed the competitive process as well as Sterling. Sterling has suffered antitrust injury by reason of the defendants' antitrust violations.

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72. As a direct and proximate result of the above-described conduct, Sterling has suffered and will suffer damages for which the defendants are liable.

**Fourth Cause of Action**

**Exclusive Dealing in Violation of Section 3 of the Clayton Act  
15 U.S.C. § 14**

73. Sterling incorporates herein by reference as if fully set forth each of the allegations contained in paragraphs 1 through 72, above.
74. Nestlé, in the course of commerce, made sales or contracts for sales of goods wares, merchandise, supplies or other commodities for use, consumption, or resale, or fixed a price charged therefor, or discount from, or rebate upon such price, in Puerto Rico on the condition, agreement, or understanding that the purchasers thereof shall not use or deal in the goods, wares, merchandise, supplies or other commodities of Nestlé's competitors.
75. The anticompetitive conduct described herein has had the effect of substantially lessening competition and has tended to create a monopoly in this line of commerce, in violation of Section 3 of the Clayton Act, 15 U.S.C. § 14.
76. As a result of the defendants' violations of Section 3 of the Clayton Act, Sterling has been effectively excluded from much of the relevant market.
77. Sterling's exclusion from competition in the relevant market has adversely affected consumers of these products and competition in general. The defendants' conduct has harmed the competitive process as well as Sterling. Sterling has suffered antitrust injury by reason of the defendants' antitrust violations.

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78. As a direct and proximate result of the above-described conduct, Sterling has suffered and will suffer damages for which the defendants are liable.

**Fifth Cause of Action**

**Conspiracy to Monopolize in Violation of Sections 1 and 3  
of the Sherman Antitrust Act  
15 U.S.C. §§ 1, 3**

79. Sterling incorporates herein by reference as if fully set forth each of the allegations contained in paragraphs 1 through 78, above.
80. Through the anticompetitive conduct described herein, Nestlé has conspired with competitors, suppliers and buyers to acquire and maintain monopoly power in the relevant market.
81. Nestlé has illegally conspired to acquire and/or maintain its monopoly, and its anticompetitive conduct has enabled it to do so, in violation of Sections 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 3.
82. As a result of these violations of the Sherman Act, Sterling has been effectively excluded from the relevant market.
83. Sterling's exclusion from competition in the relevant market has adversely affected consumers of these products and competition in general. The defendants' conduct has harmed the competitive process as well as Sterling. Sterling has suffered antitrust injury by reason of the defendants' antitrust violations.
84. As a direct and proximate result of the above-described conduct, Sterling has suffered and will suffer damages for which the defendants are liable.

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**Sixth Cause of Action**

**Unlawful Restraints of Trade in Violation of the Puerto Rico Anti-Monopoly Act  
10 P.R. Laws Ann. §§ 257 - 276**

85. Sterling incorporates herein by reference as if fully set forth each of the allegations contained in paragraphs 1 through 84, above.
86. Sterling incorporates each of the specific claims alleged above under the Sherman Act and the Clayton Act as if fully set forth also under the Puerto Rico Anti-Monopoly Act, 10 P.R. Laws Ann. §§ 257-276.
87. The defendants' anticompetitive conduct and violations including, but not limited to, exclusive dealing, have created an unreasonable restraint of trade, and the defendants have conspired to create and have created (or have attempted to create) a monopoly and have substantially reduced competition in the relevant market in the Commonwealth of Puerto Rico.
88. The defendants' conduct is designed and intended to eliminate Nestlé's competitors, in particular Sterling, in order to achieve, protect and enhance Nestlé's monopoly position and control of the relevant market.
89. The defendants' conduct constitutes an unreasonable restraint of trade in violation of the Puerto Rico Anti-Monopoly Act, 10 P.R. Laws Ann. §§ 257 - 276.
90. Sterling's exclusion from competition in the relevant market has adversely affected consumers of these products and competition in general. The defendants' conduct has harmed the competitive process as well as Sterling. Sterling has suffered antitrust injury by reason of the defendant's antitrust violations.

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91. As a direct and proximate result of the above-described conduct, Sterling has suffered and will suffer damages, for which the defendants are liable.

**Seventh Cause of Action**

**Monopolization in Violation of Section 260 of the Puerto Rico Anti-Monopoly Act  
10 P. R. Laws Ann. § 260**

92. Sterling incorporates herein by reference as if fully set forth each of the allegations contained in paragraphs 1 through 91, above.
93. Nestlé possesses monopoly power in the market for the distribution of ice cream products in Puerto Rico.
94. Through the anticompetitive conduct described herein, Nestlé has willfully acquired and maintained its monopoly power in the relevant market. Nestlé has acted with an intent to illegally acquire and maintain its monopoly, and its anticompetitive conduct has enabled it to do so, in violation of Section 260 of the Puerto Rico Anti-Monopoly Act, 10 P.R. Laws Ann. § 260.
95. Through the anticompetitive conduct described herein, Nestlé has, along with other entities, including defendant Payco, willfully conspired to acquire and maintain its monopoly power in this market. Nestlé has acted with a general intent to illegally conspire to acquire and/or maintain its monopoly, and its anticompetitive conduct has enabled it to do so, in violation of Section 260 of the Puerto Rico Anti-Monopoly Act, 10 P.R. Laws Ann. § 260.
96. Nestlé's control and maintenance of the wholesale prices of other brands with which Sterling must compete amounts to a price-squeeze that adversely impacts

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competition. This affected and reduced Sterling's market share and ability to compete in the relevant market, unlawfully enhanced defendants' monopoly power, and injured consumers through both increased retail prices and constricted retail options.

97. As a result of Nestlé's violations of Section 260 of the Puerto Rico Anti-Monopoly Act, Sterling has been effectively excluded from much the relevant market.
98. Sterling's exclusion from competition in the relevant market has adversely affected consumers of these products and competition in general. The defendant's conduct has harmed the competitive process as well as Sterling. Sterling has suffered antitrust injury by reason of the defendants' antitrust violations.
99. As a direct and proximate result of the above-described conduct, Sterling has suffered and will suffer damages for which the defendants are liable.

**Eighth Cause of Action**

**Attempted Monopolization in Violation of Section 260 of the Puerto Rico  
Anti-Monopoly Act  
10 P.R. Laws Ann. § 260**

100. Sterling incorporates herein by reference as if fully set forth each of the allegations contained in paragraphs 1 through 99, above.
101. Nestlé possesses substantial market power in the market for the distribution of ice cream products in Puerto Rico.



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102. Through the anticompetitive conduct described herein, Nestlé has willfully attempted to acquire and maintain its monopoly power in the relevant market. Nestlé has acted with a specific intent to attempt to illegally acquire and maintain its monopoly, and its anticompetitive conduct has enabled it to do so, in violation of Section 260 of the Puerto Rico Anti-Monopoly Act, 10 P.R. Laws Ann. § 260.
103. There is a dangerous probability that Nestlé will succeed in its attempt to achieve monopoly power in the relevant market because of its exclusionary conduct.
104. As a result of Nestlé's violations of Section 260 of the Puerto Rico Anti-Monopoly Act, Sterling has been effectively excluded from the relevant market.
105. Sterling's exclusion from competition in the relevant market has adversely affected consumers of these products and competition in general. The defendant's conduct has harmed the competitive process as well as Sterling. Sterling has suffered antitrust injury by reason of the defendants' antitrust violations.
106. As a direct and proximate result of the above-described conduct, Sterling has suffered and will suffer damages for which the defendants are liable.

**TRIAL BY JURY**

107. Plaintiff Sterling hereby demands trial by jury on all issues and claims raised in this Amended Complaint.

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**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff Sterling respectfully requests:

- A. That this Honorable Court declare, adjudge, and decree that the defendants have committed the violations of federal and state antitrust law alleged herein;
- B. That this Honorable Court permanently enjoin the defendants and their agents and employees from continuing their unlawful conduct set forth herein and provide other appropriate injunctive relief;
- C. That Sterling recover its actual damages, in an amount to be determined at trial, and treble the damages it has sustained and will sustain as a result of the federal and state antitrust violations alleged herein;
- D. That Sterling recover its reasonable attorneys' fees and costs of suit;
- E. That Sterling recover pre-judgment interest and post-judgment interest on the above sums at the highest rate allowed by law; and
- F. That Sterling be granted such other and further relief as the Court may deem just and proper under the law.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico on this 15th day of June, 2007.

**INDIANO & WILLIAMS, P.S.C.**  
Attorneys for Plaintiff  
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By: \_\_\_\_\_  
**DAVID C. INDIANO**  
**USDC PR Bar No. 200601**

By: \_\_\_\_\_  
**JEFFREY M. WILLIAMS**  
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By: s/ Seth A. Erbe  
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# EXHIBIT B

AO88 (Rev. 12/06) Subpoena in a Civil Case

**Issued by the**  
**UNITED STATES DISTRICT COURT**  
 NORTHERN DISTRICT OF CALIFORNIA

STERLING MERCHANDISING, INC.,

**SUBPOENA IN A CIVIL CASE**

V.

NESTLE, S.A.; NESTLE PUERTO RICO, INC. and  
PAYCO FOODS CORPORATIONCase Number:<sup>1</sup> 06-CV-1015 USDC DPR

TO: Dreyer's Grand Ice Cream, Inc.  
 Mark Lehocky, Registered Agent  
 5959 College Avenue  
 Oakland, CA 94618

☐ YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. See Exhibit B (attached)

PLACE OF DEPOSITION

Zelle, Hoffman, Voelbel, Mason & Gette LLP  
 44 Montgomery Street, Suite 3400, San Francisco, CA 94104

DATE AND TIME

9/25/2007 9:00 am

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

Exhibit A (attached)

PLACE

DATE AND TIME

9/11/2007 9:00 am

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

DATE



August 29, 2007

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

David J. Gilles, Godfrey &amp; Kahn, S.C., 1 East Main Street, PO Box 2719, Madison, WI 53701-2719 (608) 257-3911

(See Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), on next page)

<sup>1</sup> If action is pending in district other than district of issuance, state district under case number.

AO88 (Rev. 12/06) Subpoena in a Civil Case

## PROOF OF SERVICE

DATE

PLACE

SERVED

SERVED ON (PRINT NAME)

MANNER OF SERVICE

SERVED BY (PRINT NAME)

TITLE

## DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on

DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as amended on December 1, 2006:

## (c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises — or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject

to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

## (d) DUTIES IN RESPONDING TO SUBPOENA.

(1) (A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) CONTEMPT. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

### EXHIBIT A

Pursuant to Federal Rule of Civil Procedure 45(a)(2)(C), **YOU ARE COMMANDED** to produce and permit the inspection and copying of the following documents by the date and time specified in the subpoena to which this exhibit is attached. Please contact David J. Gilles at (608) 257-3911 to make arrangements for Sterling's inspection of the documents or if you have questions concerning this subpoena.

Failure to comply with this subpoena may result in punishment for contempt, which may include monetary penalties, imprisonment, and other sanctions.

### Definitions

1. The term "document" or "documents" as used herein shall be defined to the broadest extent permitted by Federal Rules of Civil Procedure 26 and 34, and includes, whenever applicable and without limitation, the originals (absent any original, a copy) of any recordation of any intelligence or information, whether handwritten, typed, printed, electrically, magnetically or otherwise computer stored or accessible, or otherwise visually or aurally reproduced.

"Document" shall include all drafts of responsive documents as well as all non-identical copies.

2. The term "communication" refers to any form of communication and shall include, but shall not be limited to, oral communications, whether in person, by telephone or otherwise, and written communications, whether by letter, e-mail or otherwise, including any form of electronic transmission. Plaintiff expects you to conduct a thorough examination of your e-mails in each request where a communication is requested.

3. The term "Dreyer's" shall refer to Dreyer's Grand Inc. Cream, Inc. or any representative or agent thereof.

4. The term "Sterling" shall refer to Sterling Merchandising, Inc. or any representative or agent thereof.

5. The term "Edy's" shall refer to the ice cream brands "Edy's® Grand Ice Cream," "Edy's® Slow Churned," "Edy's® Loaded," "Edy's® Dibs," "Edy's® Fruit Bars," and "Edy's® Sherbet," and all related ice cream products.

6. Unless otherwise noted in a request below, this subpoena requires Dreyer's to produce all responsive documents generated on or after January 1, 2002. If a specific request specifies an earlier date, that date shall control.

#### **Document Requests**

1. Any organizational charts showing name(s), position(s), last known addresses, and the reporting relationships for Dreyer's employees responsible for Edy's brand management, marketing and distribution in the United States and Puerto Rico.

2. Dreyer's communications sent to and received from Sterling regarding the distribution of Edy's in Puerto Rico, excluding invoices.

3. Dreyer's communications sent to and received from Payco Foods Corporation, Nestlé S.A., Nestlé Puerto Rico, Inc. or any other Nestlé affiliate regarding Sterling.

4. All documents regarding the analysis of market data for ice cream products sold in Puerto Rico, including market share information, prices, price trends, sales volume and revenue, retail outlet penetration and related reports, compilations and recommendations.

5. Quantitative and qualitative market research reports or analysis regarding ice cream products (including Edy's), such as, but not limited to, syndicated research and other market analysis and data purchased from third parties, studies regarding brand loyalty, market simulation, product concept, media plans, market segmentation, price elasticity, consumer



perceptions and behavior analyses of non-price promotional efforts (in-store display and advertising), temporary price reductions, and other market analyses for Puerto Rico and the United States and for Hispanic customers in the United States.

6. Market studies and reports obtained from A.C. Nielsen, New York, NY, Information Resources, Inc. (IRI), Chicago, IL, and other companies regarding the promotion and sale of Edy's ice cream and other ice cream products.

7. All documents regarding price increases for Edy's (or decreases in allowances, rebates, or related payments) to both Sterling and other Edy's distributors in the United States and the bases for those increases (or decreases).

8. All documents regarding payments made to retailers in Puerto Rico for any reason including, but not limited to, slotting allowances, pay-to-stay programs, advertising, shoppers or rebates for product, whether paid directly to retailers or as reimbursement to Sterling.

## **EXHIBIT B**

Pursuant to Federal Rules of Civil Procedure 30(b)(6) and 45(a)(2)(B), **YOU ARE COMMANDED** to appear for a deposition upon oral examination of one or more of your officers, directors, managing agents, or other persons designated by Dreyer's who can testify on Dreyer's behalf as to the following topics. In addition, Dreyer's is requested to provide Sterling with written notice, at least ten (10) days in advance of the deposition, of: (1) the name and employment position of each designee who has consented to testify on behalf of Dreyer's; and, (2) the topic category each designee has agreed to testify about.

The deposition will take place on August 21, 2007 at 9:00 a.m. at the offices of Zelle, Hoffman, Voelbel, Mason & Gette LLP, 44 Montgomery Street, Suite 3400, San Francisco, CA 64104, before an officer authorized by law to administer oaths and will continue from day to day thereafter, excluding weekends and holidays, until completed. The deposition will be recorded by stenographic means. Please contact David J. Gilles at (608) 257-3911 if you have questions concerning this subpoena.

Failure to comply with this subpoena may result in punishment for contempt, which may include monetary penalties, imprisonment, and other sanctions.

### **Definitions**

1. The term "communication" refers to any form of communication and shall include, but shall not be limited to, oral communications, whether in person, by telephone or otherwise, and written communications, whether by letter, e-mail or otherwise, including any form of electronic transmission.

2. The term "Dreyer's" shall refer to Dreyer's Grand Ice Cream, Inc. or any employee, representative or agent thereof.

3. The term "Sterling" shall refer to Sterling Merchandising, Inc. or any representative or agent thereof.

4. The term "Edy's" shall refer to the ice cream brands "Edy's® Grand Ice Cream," "Edy's® Slow Churned," "Edy's® Loaded," "Edy's® Dibs," "Edy's® Fruit Bars," and "Edy's® Sherbet," and all related ice cream products.

5. Unless otherwise noted in a topic below, this subpoena requires Dreyer's to produce an individual with knowledge of each topic for the time period of January 1, 2002 to the present. If a specific topic specifies an earlier date, that date shall control.

#### **Deposition Topics**

1. Dreyer's business relationship with Sterling regarding the distribution and sale of Edy's and other ice cream products within Puerto Rico.

2. The identity of each Dreyer's employee and/or agent who has been involved with or responsible for the Sterling business relationship including each employee's and/or agent's name, last known address, position, employment responsibility, and the identification of supervisors and reporting relationships for such employees.

3. Dreyer's communications with Sterling regarding the distribution of Edy's and other ice cream products in Puerto Rico.

4. Dreyer's communications with Payco Foods Corporation, Nestlé S.A., Nestlé Puerto Rico, Inc. or other Nestle affiliate regarding Sterling's distribution of Edy's ice cream products.

5. Dreyer's communications with Sterling regarding ice cream distribution in Puerto Rico.

6. The analysis of market data for ice cream products in Puerto Rico, including market share information, retail prices, retail price trends, sales volume and revenue, retail outlet penetration and related business plans and market strategies.

7. The identity of each Dreyer's employee and/or agent who has been involved with or responsible for managing the Edy's brand.

8. The identity of each Dreyer's employee and/or agent who has been involved with or responsible for collecting and analyzing market data and preparing reports and recommendations regarding market strategies including, but not limited to, retail pricing and location selection.

9. Quantitative and qualitative market research regarding ice cream products (including Edy's), such as, but not limited to, syndicated research and other market analysis and data purchased from third parties, studies regarding brand loyalty, market simulation, product concept, media plans, market segmentation, price elasticity, consumer perceptions and behavior analyses of non-price promotional efforts (in-store display and advertising), temporary price reductions, and other market analyses for Puerto Rico and the United States and for Hispanic customers in the United States.

10. Marketing strategies regarding Edy's ice cream and other ice cream products involving the payment of retail slotting fees, pay-to-stay fees or other payments to retailers for retail space, other point of sale promotional assistance available to distributors or retailers in Puerto Rico and other markets in the United States, and the identity of employees responsible for the authorization of such payments and assistance.

11. Market studies and reports obtained from A.C. Nielsen, New York, NY, Information Resources, Inc. (IRI), Chicago, IL, and other companies regarding the promotion and sale of Edy's ice cream and other ice cream products.

12. Price increases for Edy's (or decreases in allowances, rebates, or related payments) to both Sterling and other Edy's distributors in the United States and the bases for those increases (or decreases).

13. Payments made to retailers in Puerto Rico for any reason including, but not limited to, slotting allowances, pay-to-stay programs, advertising, shoppers or rebates for product, whether paid directly to retailers or as reimbursement to Sterling.

mn320972\_1

# EXHIBIT C

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF PUERTO RICO

3  
4 STERLING MERCHANDISING, INC., )

5 PLAINTIFF, )

6 VS. )

) NO. 06-CV-1015

7 NESTLE, S.A.; NESTLE PUERTO RICO, )  
8 INC.; and PAYCO FOODS CORPORATION, )

9 DEFENDANTS. )  
\_\_\_\_\_)

10  
11  
12  
13 DEPOSITION OF WILLIAM COLLETTE, taken on behalf  
14 of the Plaintiff at Howrey LLP, 525 Market Street, Suite  
15 3600, San Francisco, California, commencing at 9:14 a.m.,  
16 Wednesday, November 14, 2007, before JODY GIBNEY,  
17 Certified Shorthand Reporter No. 12308.

18  
19  
20  
21  
22  
23  
24  
25  
WILLIAM COLLETTE

Page 2

Page 4

## 1 APPEARANCES:

## 4 FOR THE PLAINTIFF:

5 GODFREY & KAHN S.C.  
 6 One East Main Street  
 7 Post Office Box 2719  
 8 Madison, Wisconsin 53701-2719  
 9 (608) 257-3911  
 10 BY: DAVID J. GILLES

## 10 FOR THE DEFENDANTS:

11 HOWREY LLP  
 12 1299 Pennsylvania Avenue, NW  
 13 Washington, D.C. 20004-2402  
 14 (202) 383-7046  
 15 BY: CARMINE R. ZARLENGA  
 16

17 --oOo--  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

## 1 Deposition Exhibits:

2 No. 10 September 8, 2003 e-mail from Felipe 38  
 3 Silva to Juan Reyes and others with  
 4 attached PowerPoint presentation  
 5 (16 pages)  
 6 No. 11 September 22, 2003 e-mail from Stanley 42  
 7 Pasarell to Robert Nealis  
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 9 No. 12 October 16, 2003 e-mail from Felipe 44  
 10 Silva to Robert Nealis  
 11 (1 page)  
 12 No. 13 September 10, 2003 e-mail from Ivan 45  
 13 Galinovic to Robert Nealis  
 14 (2 pages)  
 15 No. 14 April 20, 2004 e-mail from John B. 48  
 16 Williams to Bob Birchbauer  
 17 (2 pages)  
 18 No. 15 May 24, 2004 e-mail from John B. 52  
 19 Williams to Robert Nealis with  
 20 attachment  
 21 (4 pages)  
 22 No. 16 June 9, 2004 e-mail from Tahira Hassan 54  
 23 to Felipe Silva and others re Ice  
 24 Cream Exports from USA to the  
 25 Caribbean Region  
 (2 pages)  
 No. 17 November 22, 2004 e-mail from Greg 57  
 Frick to Robert Nealis  
 (2 pages)  
 No. 18 November 29, 2004 letter from Bob 59  
 Birchbauer to John Williams  
 (3 pages)  
 No. 19 e-mail string between Stan Krause and 62  
 Robert Nealis and others  
 (2 pages)  
 No. 20 April 7, 2005 e-mail from Stan Krause 68  
 to John Williams  
 (1 page)

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 11 No. 2 2001 Plan Summary 14  
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 13 No. 3 December 13, 2001 letter from Bob 18  
 14 Birchbauer to John Williams  
 15 (1 page)  
 16 No. 4 Total Ice Cream Category Market Share 20  
 17 Value by Company  
 18 (4 pages)  
 19 No. 5 August 20, 2003 e-mail from Robert 28  
 20 Nealis to Thomas@paycofoods.com  
 21 (1 page)  
 22 No. 6 August 20, 2003 e-mail from Robert 30  
 23 Nealis to Jorge Sadurni with  
 24 attachment  
 25 (3 pages)  
 No. 7 August 28, 2003 e-mail from Thomas 33  
 Ward to Robert Nealis  
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 No. 8 August 27, 2003 e-mail from Robert 34  
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 No. 9 Edy's Grand Ice Cream Confidential 37  
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## 1 Deposition Exhibits:

2 No. 21 June 27, 2005 e-mail from Karen 70  
 3 O'Keefe to Bob Birchbauer and Robert  
 4 Nealis  
 5 (6 pages)  
 6 No. 22 August 24, 2005 e-mail from Robert 72  
 7 Nealis to Tom Delaplaine  
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 9 No. 23 January 24, 2006 e-mail from Christine 73  
 10 Hart to Robert Nealis with attached  
 11 spreadsheet  
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 13 No. 24 March 6, 2006 e-mail from Robert 75  
 14 Nealis to Stanley Pasarell  
 15 (2 pages)  
 16 No. 25 March 10, 2005 e-mail from Paul Giomi 76  
 17 to Robert Nealis  
 18 (2 pages)  
 19 No. 26 March 16, 2006 e-mail from Lee Partin 78  
 20 to Robert Nealis with attached  
 21 spreadsheet  
 22 (4 pages)  
 23 No. 27 March 28, 2006 e-mail from Robert 80  
 24 Nealis to John Williams  
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 No. 28 September 5, 2006 e-mail string 82  
 between Paul Giomi and Sally Graham  
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 No. 29 October 6, 2006 e-mail from Paul Giomi 84  
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 No. 30 December 21, 2006 e-mail string 86  
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<p style="text-align: right;">Page 6</p> <p>1 Deposition Exhibits:</p> <p>2 No. 32 June 11, 2007 e-mail from Paul Giomi 89 to Ronda Maples (1 page)</p> <p>3</p> <p>4 No. 33 July 11, 2007 e-mail string between 91 Paul Giomi and Terri George; Ronda Maples with attachment (4 pages)</p> <p>5</p> <p>6 No. 34 Payco Pricing Worksheet 93 (2 pages)</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 8</p> <p>1 A. That means I'm retired from active service, and I</p> <p>2 have as a part of my salary continuation obligations to</p> <p>3 Dreyer's to work on certain matters during that period of</p> <p>4 time, including the Sterling matter.</p> <p>5 Q. When did you assume that status?</p> <p>6 A. As of September 1 of 2007.</p> <p>7 Q. Could you please describe your -- the positions</p> <p>8 that you've held during the 20 years that you've worked at</p> <p>9 Dreyer's?</p> <p>10 A. I was the treasurer of Dreyer's Grand Ice Cream,</p> <p>11 Inc., and all the various subsidiaries of Dreyer's Grand</p> <p>12 Ice Cream. I was responsible for financing, both external</p> <p>13 financing of the company through third-party-sources</p> <p>14 banking; I was responsible for investment banking</p> <p>15 relationships; investor relations; I was responsible for</p> <p>16 legal interface with outside counsel for Dreyer's during</p> <p>17 that period of time; and I was responsible for risk</p> <p>18 management.</p> <p>19 Q. Briefly, what was your educational background?</p> <p>20 What is it?</p> <p>21 A. I'm a graduate of University of California at</p> <p>22 Berkeley, 1971, in history, and I have an MBA from the</p> <p>23 University of Minnesota in 1978.</p> <p>24 Q. Mr. Collette, I'd like to show you what has been</p> <p>25 marked as Exhibit 1 and ask if you've seen that before.</p>
<p style="text-align: right;">Page 7</p> <p>1 San Francisco, California; Wednesday, November 14, 2007</p> <p>2 9:14 a.m.</p> <p>3</p> <p>4 WILLIAM COLLETTE,</p> <p>5 having been first duly sworn, was</p> <p>6 examined and testified as follows:</p> <p>7 EXAMINATION BY MR. GILLES</p> <p>8 MR. GILLES: Q. Mr. Collette, My name is David</p> <p>9 Gilles, and I represent the plaintiff in a lawsuit pending</p> <p>10 in District Court in Puerto Rico involving Sterling</p> <p>11 Merchandising against Payco Foods and Nestle Puerto Rico,</p> <p>12 and Nestle, S.A., I think is still on the caption.</p> <p>13 MR. ZARLENGA: We'll try and get that fixed.</p> <p>14 MR. GILLES: I understand.</p> <p>15 Q. It's my understanding, sir, that you're here</p> <p>16 today in response to a subpoena that was served on</p> <p>17 Dreyer's Grand Ice Cream, Incorporated?</p> <p>18 A. That's correct.</p> <p>19 Q. Would you please state your name, sir?</p> <p>20 A. It's William Collette.</p> <p>21 Q. And what is your position with Dreyer's?</p> <p>22 A. I am or was the treasurer of Dreyer's Grand Ice</p> <p>23 Cream for 20 years. I am currently on salary continuation</p> <p>24 with Dreyer's until the middle of 2009.</p> <p>25 Q. Does that mean that you're retired?</p>	<p style="text-align: right;">Page 9</p> <p>1 (Deposition Exhibit 1 was marked for</p> <p>2 identification.)</p> <p>3 THE WITNESS: Yes, I have.</p> <p>4 MR. GILLES: Q. This is an amended notice that</p> <p>5 was served in this case relating to the deposition of</p> <p>6 Dreyer's.</p> <p>7 And I would ask what you've done to prepare for</p> <p>8 the deposition today, sir?</p> <p>9 A. Yes. I have over the course of three, three and</p> <p>10 a half days reviewed the documentation that has been</p> <p>11 collected in response to the materials that were presented</p> <p>12 to Dreyer's, by Dreyer's, and I have refreshed my own</p> <p>13 memory with respect to that documentation and the period</p> <p>14 of time that it covers. I have discussed the</p> <p>15 documentation and the matters therein with counsel, and</p> <p>16 we've had discussions with individuals at Dreyer's that</p> <p>17 are active employees at Dreyer's now, around that matter.</p> <p>18 Q. Is Mr. Robert Nealis an active employee of</p> <p>19 Dreyer's?</p> <p>20 A. Mr. Robert Nealis is of the same status, in</p> <p>21 effect, that I am. He is on a salary continuation</p> <p>22 package.</p> <p>23 Q. Did you have discussions with Mr. Nealis in</p> <p>24 preparation for the deposition today?</p> <p>25 A. No, I did not.</p>

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1 Q. Who specifically did you have discussions with at  
2 Dreyer's?

3 A. I had discussions with Mr. Paul Giomi.

4 Q. What is Mr. Giomi's position?

5 A. Mr. Giomi is responsible for international sales,  
6 certain aspects of international sales relationships for  
7 Dreyer's Grand Ice Cream, Inc.

8 Q. Who else did you speak with?

9 A. I did not speak with anyone else specifically at  
10 Dreyer's now.

11 Q. And you are prepared to testify with respect to  
12 the matters outlined in the Exhibit 1?

13 A. Yes, I am.

14 Q. Could you briefly describe Dreyer's business?

15 A. Yes. Dreyer's is a manufacturer and distributor  
16 of ice cream products, packaged ice cream products and  
17 novelty ice cream products, to the grocery trade and to  
18 other classes of trade in the United States and in certain  
19 foreign markets.

20 Q. And is -- what are Dreyer's primary brands that  
21 it distributes and manufactures?

22 A. Dreyer's primary brands are Dreyer's Grand Ice  
23 Cream, in the Western states -- that's a premium ice  
24 cream, packaged premium ice cream -- Edy's Grand Ice  
25 Cream, in the Eastern United States, a premium ice cream;

Page 11

1 Haagen-Dazs, which is a superpremium ice cream; the Nestle  
2 novelties, including Nestle Crunch, Drumstick, and other  
3 brands; certain light ice cream brands; SlowChurned, which  
4 is a packaged premium product.

5 Q. And is a light ice cream brand marketed under the  
6 name Dreyer's and Edy's?

7 A. Yes, Dreyer's SlowChurned. That would be a  
8 subbrand under Dreyer's or Edy's.

9 Q. And is it, my understanding, correct that Edy's  
10 is the number one national brand in terms of sales in the  
11 United States, the domestic United States?

12 A. I believe -- I believe that Dreyer's and Edy's  
13 taken together are the largest selling brand in the United  
14 States.

15 Q. I would like to direct your attention to the  
16 distribution of ice cream in Puerto Rico.

17 A. Um-hm.

18 Q. Did there come a time in the early 1990s when  
19 Dreyer's became interested in distributing Edy's in Puerto  
20 Rico?

21 A. Yes.

22 Q. Could you describe how that took place?

23 A. I can describe to you the result of that  
24 interest, not precisely how it came about. But Dreyer's,  
25 in fact, established a relationship in Puerto Rico in the

Page 12

1 early '90s for the distribution of Edy's through a  
2 distributor, then Dynamic Merchandise.

3 Q. And did that distributor change its name over  
4 time?

5 A. I don't know if that's the precise -- precisely  
6 correct way to state it. Dynamic Merchandise then  
7 assigned, with Dreyer's consent, the distribution of ice  
8 cream in Puerto Rico to Sterling Merchandise.

9 Q. The person that Dreyer's was dealing with for  
10 Dynamic was John Williams?

11 A. Yes. I believe that's correct.

12 Q. And he continued to be the primary contact for  
13 Sterling Merchandise?

14 A. Yes. That's what the documentation reflects.  
15 That's correct.

16 Q. That relationship has continued until today?

17 A. Yes.

18 Q. In addition to distributing, the relationship  
19 with Sterling Merchandising, today Dreyer's also has a  
20 relationship with another ice cream distributor in Puerto  
21 Rico?

22 A. Dreyer's. Yes, that's correct.

23 Q. And that's Payco Foods Corporation?

24 A. Yes, that's correct.

25 Q. And how long has Dreyer's had that relationship?

Page 13

1 A. That relationship has been in place since 2004, I  
2 believe.

3 Q. Was that a consequence of the combination of  
4 Dreyer's and Nestle in -- the transaction, I believe,  
5 began in 2002 and was finally approved in 2004 by the  
6 Federal Trade Commission.

7 MR. ZARLENGA: I'll object to the vagueness of  
8 that question and lack of proper foundation.

9 THE WITNESS: The transaction -- you have to  
10 let -- help me out in terms of how you want that  
11 transaction described.

12 MR. GILLES: Q. How would you describe that  
13 transaction, sir?

14 A. Dreyer's and Nestle entered into an agreement in  
15 2002 that was subsequently closed in June of 2003 whereby  
16 Dreyer's Grand Ice Cream, Inc., acquired the Nestle Ice  
17 Cream Company in the United States for newly issued stock  
18 which resulted in Nestle owning 66 percent of the common  
19 equity of Dreyer's Grand Ice Cream and 33 percent of  
20 common equity continuing to be held by public shareholders  
21 through Dreyer's security that was issued in trading on  
22 NASDAQ.

23 Q. Did there come a point in time following that  
24 when Nestle acquired the balance of the stock that was  
25 publicly traded?

Page 14

1 A. The shareholders -- the public shareholders  
2 received, in the 2003 transaction, a one-for-one exchange  
3 of stock that included on it a put right, at the option of  
4 the shareholders, to put the stock to Dreyer's in --  
5 beginning at a period beginning at the beginning of 2006  
6 for a fixed price. And that put period matured, became  
7 available at the beginning of 2006, at which time a  
8 sufficient number of shareholders put their stock such  
9 that Nestle became the owner of 100 percent of the common  
10 equity of Dreyer's on January 18, 2006.

11 Q. And earlier you mentioned it was in 2004 that  
12 Dreyer's began its relationship with Payco in Puerto Rico.

13 A. I believe that it was 2004.

14 Q. In addition to distributing through independent  
15 distributors, does Dreyer's also distribute through its  
16 own distribution channels?

17 A. Yes.

18 (Deposition Exhibit 2 was marked for  
19 identification.)

20 MR. GILLES: Q. I would like to show you what's  
21 been marked as Exhibit No. 2, which is Dreyer's No. 2133  
22 through Dreyer's 2136, and ask if you could identify that.

23 A. This looks to me to be an annual plan for the  
24 southeast division of Dreyer's.

25 Q. So it's a projection of sales for a future time

Page 15

1 period?

2 A. It looks like it's the final plan for 2001.

3 Q. And this would have been prepared sometime in  
4 January of 2001?

5 A. It would have been finalized in January 2001. It  
6 would have been prepared in the preceding quarter.

7 Q. And could you generally describe what the  
8 function of the plan is?

9 A. The function of the plan is to plan for the  
10 sales, expenses, and results of the division, in this case  
11 the southeast division, for the calendar year 2001.

12 Q. And I note on the left-hand column -- could you  
13 describe what's set out, just generally, in the left-hand  
14 column on the first page of the exhibit, under "2001 Plan  
15 Summary"?

16 A. It's generally an income statement format that  
17 summarizes the planned volume and expenses for the year.

18 Q. And then to the right of that, there are any  
19 number of columns. Could you -- at the head of each  
20 column, you see "Atlanta," "Alabama," "Miami"?

21 A. Yes.

22 Q. Would you identify what's represented in those  
23 columns, please?

24 A. Those columns are markets where Dreyer's has its  
25 own company-owned distribution.

Page 16

1 Q. And as we proceed to the right on the page, I see  
2 a column that's headed "CO Owned." Does that mean company  
3 owned?

4 A. Yes, it does.

5 Q. And that would be the total of the columns to the  
6 left?

7 A. Correct.

8 Q. And continuing to the right on the page, what is  
9 shown there in terms of distribution, in terms of the  
10 distribution plan?

11 A. Those are independent distributors operating  
12 within the southeast division.

13 Q. So going to the column about two-thirds of the  
14 way over, I see "Puerto Rico." Does that concern Sterling  
15 Merchandising?

16 A. Yes.

17 Q. Would any other entity be included in that  
18 column?

19 A. Not that I'm aware of.

20 Q. Does it -- if we look down the page at -- under  
21 "Expenses," under the "201 Plan Summary," I see the  
22 heading "Expenses."

23 Do you see that?

24 A. Um-hm.

25 Q. And I note under the first column, for example,

Page 17

1 for Atlanta, there's a figure, 2,242. Is that -- that, I  
2 take it, is in dollars?

3 A. Yes.

4 Q. Is it in thousands of dollars or --

5 A. Yes.

6 Q. And I note if we go over to the column under  
7 "Puerto Rico," there's a 0 indicated.

8 Do you see that?

9 A. Correct.

10 Q. What accounts for the difference?

11 A. The column you previously referred to is a  
12 company-owned route structure where the company owns,  
13 operates, and is responsible for the expenses associated  
14 with the distribution of ice cream in that market, so  
15 route expenses there would be the cost of driving the  
16 trucks and using those trucks in that particular market.

17 In Puerto Rico, Puerto Rico is an independent  
18 distributor and those expenses are borne by the  
19 independent distributor.

20 Q. What are the terms of sale that Dreyer's has with  
21 Sterling Merchandising for product?

22 A. I believe that the terms are described in the  
23 documents generally. I don't know exactly what the terms  
24 of sales are from memory.

25 Q. Sure. In preparation for today, sir, did you

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1 review the documents which Mr. Nealis produced?  
 2 A. I reviewed all the documents that were produced  
 3 that were responsive to the various categories here.  
 4 (Deposition Exhibit 3 was marked for  
 5 identification.)  
 6 MR. GILLES: Q. Mr. Collette, I'd like to show  
 7 you what we've marked as Exhibit No. 3. Can you, first of  
 8 all, identify who Mr. Bob Birchbauer is?  
 9 A. Mr. Birchbauer is a general manager at that time  
 10 in the southeast division.  
 11 Q. And was he -- what was his responsibility with  
 12 respect to Sterling Merchandising?  
 13 A. He had a direct relationship with Sterling for  
 14 the distribution of ice cream through the southeast  
 15 division to Sterling.  
 16 Q. Who did Mr. Birchbauer report to?  
 17 A. He reported to Greg Frick.  
 18 Q. And what was Mr. Frick's position?  
 19 A. He was the division manager, southeast division.  
 20 Q. Was he located in Florida?  
 21 A. Yes, he was.  
 22 Q. Who did Mr. Frick report to? Again, this is  
 23 2001.  
 24 A. He reported to Mr. Tom Delaplane.  
 25 Q. What was Mr. Delaplane's position?

Page 19

1 A. He was the vice president of sales, Dreyer's  
 2 Grand Ice Cream.  
 3 Q. Did Mr. Birchbauer have anyone working for him  
 4 that interacted directly with Sterling Merchandising?  
 5 A. He would have had people in his organization that  
 6 were responsible for the execution of the order and  
 7 delivery of products to Puerto Rico.  
 8 Q. If someone had a question about whether the  
 9 number of items ordered corresponded with the bill, they  
 10 probably would speak with someone in Mr. Birchbauer's  
 11 organization?  
 12 A. Yes, that's correct.  
 13 Q. In the first paragraph, sir, it refers to EDLP.  
 14 Do you have an understanding of what that means?  
 15 A. Yes.  
 16 Q. Would you explain that to me?  
 17 A. That is a industry term in the grocery industry  
 18 that means everyday low price.  
 19 Q. Does it contrast with another approach that might  
 20 be implemented with the sale of grocery items?  
 21 A. I'm not sure exactly what you -- what do you  
 22 mean, "contrast with"?  
 23 Q. Well, if -- it talks about initiating the EDLP,  
 24 and I'm wondering what -- what was in place before the  
 25 EDLP was initiated?

Page 20

1 A. I'm not aware, and I don't think the documents  
 2 will reflect exactly what was in place in that same  
 3 terminology.  
 4 Q. So it means everyday low pricing?  
 5 A. Everyday low price.  
 6 Q. Low price?  
 7 A. Yes.  
 8 Q. When -- under an EDLP program, does -- from time  
 9 to time do specific products go on sale? Special?  
 10 A. Typically, no. The term suggests that the  
 11 pricing strategy at the retail level is to have the low  
 12 price every day, and that's literally what it means.  
 13 (Deposition Exhibit 4 was marked for  
 14 identification.)  
 15 MR. GILLES: Q. Mr. Collette, I'd like to show  
 16 you what's been marked as Exhibit No. 4 and ask if you can  
 17 identify that, please. Exhibit No. 4, excuse me, bears  
 18 Bates No. Dreyer's 2413 through Dreyer's 2416.  
 19 A. This appears to be a Nielsen market-share report,  
 20 followed by some analytical graphics associated with it.  
 21 Q. Directing your attention to the first page, I  
 22 note at the bottom it says "Copyright ACNielsen PR."  
 23 Do you see that?  
 24 A. Yes, I do.  
 25 Q. Does that mean that this document is from Nielsen

Page 21

1 in Puerto Rico?  
 2 A. I -- I do not know that. I do not know what the  
 3 PR stands for there.  
 4 Q. Does Dreyer's have a regular arrangement with  
 5 Nielsen for market information?  
 6 A. At the time this document was produced, if this  
 7 means in 2003, yes.  
 8 Q. What arrangement was that?  
 9 A. They had a -- Nielsen provided market-share  
 10 information at the -- under an arrangement with Dreyer's  
 11 or under a contract with Dreyer's that specified what it  
 12 was.  
 13 Q. And was that provided for the -- what geographic  
 14 territories were the subject of that information?  
 15 A. I'm not specifically aware, other than it was for  
 16 the United States.  
 17 Q. Do you know whether Dreyer's obtained regular  
 18 reports regarding market shares in Puerto Rico?  
 19 A. I don't know.  
 20 Q. Who at Dreyer's would know that?  
 21 A. I'm not aware of people who are at Dreyer's now  
 22 that would know that as of 2003, so I don't know.  
 23 Q. Who has -- who worked at Dreyer's in the past  
 24 that would know that?  
 25 A. Mr. Nealis.

Page 22

1 Q. Mr. --  
 2 A. Mr. Nealis.  
 3 Q. -- Nealis.  
 4 In terms of this document, directing your  
 5 attention to the top of the columns where it says "Year  
 6 Ending On" and then there's "JJ 2001."  
 7 Do you see that?  
 8 A. Yes.  
 9 Q. Can you explain to me what that means?  
 10 A. I don't know what those particular column  
 11 headings mean.  
 12 Q. And if you will, direct your attention to the  
 13 next page of the exhibit.  
 14 A. Um-hm.  
 15 Q. I would note that it appears to have the same  
 16 title on the top of the page as the preceding page, but  
 17 the amounts in the columns are different.  
 18 Do you see that?  
 19 A. Yes.  
 20 Q. Do you know what accounts for that?  
 21 A. No.  
 22 Q. Who at Dreyer's would know how to interpret these  
 23 reports?  
 24 A. Same -- same basic response on that.  
 25 Q. Mr. Nealis?

Page 23

1 A. Yes.  
 2 Q. In terms of market information that Dreyer's  
 3 would get on a routine basis, could you describe to me  
 4 generally what resources Dreyer's had for that from, let's  
 5 say, the period 2001 through 2004.  
 6 MR. ZARLENGA: I'll object to the form of that  
 7 question as vague and overbroad.  
 8 MR. GILLES: Q. I'll restate the question.  
 9 Mr. Collette, does Dreyer's have a -- employees  
 10 who are involved in market research?  
 11 A. Yes.  
 12 Q. And does it have a particular division within the  
 13 company? How are those employees organized, sir?  
 14 A. There are employees who would look at  
 15 market-share data for various purposes in sales groups and  
 16 marketing groups.  
 17 Q. Is there an organization within Dreyer's that is  
 18 called marketing?  
 19 A. Yes.  
 20 Q. And how many -- again, during 2001 to 2004, how  
 21 many employees were in that group and what generally did  
 22 they do?  
 23 A. I don't -- I couldn't tell you specifically how  
 24 many people were in a group because there was no  
 25 particular group of that designation as you're describing

Page 24

1 it.  
 2 Q. How was it designated?  
 3 A. It wasn't designated like that.  
 4 Q. Were people that did -- I mean, we've been  
 5 talking about market research.  
 6 A. Right.  
 7 Q. What do you understand by "market research,"  
 8 Mr. Collette?  
 9 A. I understand that market research is presenting  
 10 the presence of a particular brand or product in a market.  
 11 Q. Who -- and who would undertake that at Dreyer's?  
 12 A. That would be undertaken specifically by whoever  
 13 was using the information. As I mentioned a moment ago,  
 14 that could be in sales or marketing.  
 15 Q. Did -- in analyzing the market, did Dreyer's  
 16 conduct or arrange to conduct consumer behavior studies to  
 17 determine a customer's preference with respect to ice  
 18 cream?  
 19 MR. ZARLENGA: I'm going to object to the scope  
 20 of that question as overbroad both in respect to geography  
 21 and time frame.  
 22 MR. GILLES: Q. I'll reframe the question.  
 23 During the time from 2001 to 2005, did Dreyer's  
 24 conduct consumer attitude and usage studies or behavior  
 25 studies to determine their receptiveness to purchasing

Page 25

1 Edy's ice cream?  
 2 MR. ZARLENGA: Same objection as to the  
 3 geographic scope of the question.  
 4 MR. GILLES: Q. Please respond.  
 5 A. I -- broadly, yes.  
 6 Q. Who -- did Dreyer's have people that actually did  
 7 that?  
 8 A. Yes.  
 9 Q. Did you perform focus group studies?  
 10 A. Well, yes, generally. If you are asking about  
 11 Edy's, generally, yes.  
 12 Q. What other types of studies did you perform --  
 13 did Dreyer's perform?  
 14 A. What other type of --  
 15 Q. Studies, market studies.  
 16 A. -- marketing studies?  
 17 Q. Yes.  
 18 A. I'm trying to think of a different one other than  
 19 focus groups and data analyses.  
 20 Q. By "data analyses," that would mean looking at  
 21 information about sales -- product sales and sales of  
 22 other brands that had been compiled?  
 23 A. Yes.  
 24 Q. Did Dreyer's have studies where they would ask  
 25 questions of people at grocery stores about their



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1 preference with respect to ice cream?

2 MR. ZARLENGA: Let me just make an objection to  
3 these questions to the extent you're going beyond Puerto  
4 Rico. I'm just objecting to the scope of the questions.

5 The witness will give his answers, but I don't --  
6 I think it's beyond the scope of the notice and I think  
7 the questions are objectionable, so I want to note that  
8 for the record.

9 MR. GILLES: I disagree.

10 Q. So with respect to -- you mentioned focus groups?  
11 Has Dreyer's conducted interviews, attempted to  
12 survey consumers about their ice cream purchasing habits?

13 A. I'm not aware of any specifically.

14 Q. Has Dreyer's conducted elasticity studies to see  
15 the effect of varying the price of its product on sales?

16 A. Where?

17 Q. Well, in Puerto Rico.

18 A. Not that I'm aware.

19 Q. In the United States?

20 A. Yes.

21 Q. In what markets in the United States?

22 A. I'm not specifically aware of that.

23 Q. Okay. When was that done?

24 A. That process, I'm not aware of specific dates  
25 unless it's reflected in here.

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1 Q. Has -- does Dreyer's continue to do that today?

2 A. Yes.

3 Q. Can you describe to me how it approaches that --  
4 that effort?

5 A. I'm not sure what you mean by "approaches the  
6 effort."

7 Q. What process it uses to evaluate the price points  
8 of ice cream.

9 A. Using the kind of data that is collected both  
10 from the sale, through its own records, and through market  
11 data collected by various firms such as Nielsen.

12 Q. Who's responsible for analyzing the information  
13 at Dreyer's?

14 A. Are you referring to what time period?

15 Q. Today.

16 A. Today. Broadly -- seems like it would be a  
17 simple question, but it's not.

18 Those in charge of whatever the particular market  
19 would be.

20 Q. If -- if Mr. Williams had a question regarding  
21 the pricing of his product, who would he contact at  
22 Dreyer's concerning that?

23 A. He would direct them, I would -- I would  
24 believe -- I don't know the specific answer to that, but I  
25 believe he would direct it to his relationship, most

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1 direct relationship with Dreyer's.

2 Q. And today, who is that?

3 A. I'm not aware of who that is today.

4 Q. In the past, it would have been, for example,  
5 Robert Birchbauer?

6 A. Yes.

7 Q. Does Mr. Giomi have -- strike that.

8 I'd like to direct your attention to the third  
9 page of the exhibit, sir.

10 A. Um-hm.

11 Q. And I note at the bottom right of the page it  
12 says "Appendix B." Do you have an idea of what this was  
13 an appendix to?

14 A. I do not.

15 Q. And do you have any information about how this  
16 was prepared?

17 A. No, I do not.

18 Q. Do you know who had custody of this document that  
19 resulted in it being produced to the plaintiff in this  
20 case?

21 A. Specifically, no, I do not.

22 (Deposition Exhibit 5 was marked for  
23 identification.)

24 MR. GILLES: Q. Mr. Collette, I'd like to show  
25 you what we've marked as Exhibit No. 5 and ask if you can

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1 identify this, please.

2 A. Yes. This is an e-mail from Robert Nealis to  
3 Mr. Thomas at Payco Foods, in August of 2003.

4 Q. And Mr. Nealis was the -- his position, again,  
5 was director of international sales. Am I correct?

6 A. Correct.

7 Q. And in the first line it refers to an individual,  
8 Jorge Sandurni. Do you see that?

9 A. Um-hm, yes.

10 Q. Who is Mr. Sadurni?

11 A. Mr. Sadurni is an employee of Nestle S.A., I  
12 believe.

13 Q. What was his position in 2003?

14 A. I'm not sure precisely what it was.

15 Q. In the -- if you would, please, sir, please read  
16 the e-mail.

17 A. Um-hm.

18 Q. In the second sentence Mr. Nealis states,  
19 "Dreyer's purchase of the Nestle ice cream business in the  
20 USA clearly increases the need to explore further  
21 synergies for our respective companies."

22 A. Yes.

23 Q. Do you know what he's referring to in that  
24 sentence?

25 A. He's referring to potential synergies between

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1 Dreyer's and Nestle.

2 Q. And how does that -- how does that come to bear  
3 in Puerto Rico at the time? What synergies? Directing  
4 your attention, then, to the reference to the e-mail from  
5 Thomas Ward, do you see that in the first sentence?

6 A. Oh, yes, okay.

7 Q. Did you -- did you come across an e-mail from  
8 Mr. Ward that this is referencing?

9 A. I may have. I'm not sure exactly what it's  
10 referencing, upon reading this. I'm not aware.

11 Q. In the first sentence it refers to "potential  
12 opportunities in the Puerto Rico market."

13 Do you know what is being referred to?

14 A. Not specifically.

15 (Deposition Exhibit 6 was marked for  
16 identification.)

17 MR. GILLES: Q. Mr. Collette, I usually begin a  
18 deposition by saying that in the event you want to take a  
19 break for any reason you should feel free to tell me, and  
20 we'll take a break. Or if you don't understand a question  
21 I ask, let me know and I'll reframe it so that we're  
22 certain we're communicating.

23 Have you, sir, been deposed before?

24 A. No, I have not been deposed.

25 Q. I would like to show you, then, Mr. Collette,

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1 what's marked as Exhibit 6.

2 Would you please identify this?

3 A. An e-mail from Robert Nealis to Jorge Sadurni, in  
4 August of 2003.

5 Q. Now, at that time you were an active employee  
6 with Dreyer's?

7 A. Yes, I was.

8 Q. Were you involved in the transaction with Nestle?

9 A. Yes, I was.

10 Q. Did you have occasion to meet personally  
11 Mr. Sadurni?

12 A. No, I did not.

13 Q. Do you know where he was employed by Nestle?

14 A. No. I believe he's an employee of Nestle S.A.,  
15 which would suggest that he's in Switzerland.

16 MR. ZARLENGA: I'm going to object to the scope  
17 of the questions about Nestle employees as beyond the  
18 scope of the deposition notice.

19 MR. GILLES: Q. Please read the e-mail.

20 Directing your attention to the first paragraph  
21 and the last sentence in that paragraph, Mr. Nealis  
22 states, "As you will see, it's a soft reply because I need  
23 your guidance and consideration in order to proceed."

24 Did -- what relationship did Mr. Nealis have with  
25 Mr. Sadurni that he would need his guidance or

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1 consideration to proceed with the matter?

2 MR. ZARLENGA: I'm going to object to the form of  
3 the question as calling for speculation.

4 THE WITNESS: I'm not aware specifically of the  
5 relationship. Mr. Sadurni works generally in the area of  
6 Nestle where Puerto Rico would fall under its particular  
7 scope. The ice cream business -- excuse me, let me be  
8 specific, the ice cream business in Puerto Rico.

9 MR. GILLES: Q. And then directing your  
10 attention to the second paragraph, the third sentence  
11 states, "I've spoken to the key individuals involved and  
12 determined they would entertain a transaction governed by  
13 following principles."

14 Do you have any understanding of what transaction  
15 they were considering at the time?

16 A. I don't have a specific knowledge of what  
17 transaction was being contemplated.

18 Q. In the -- in the third paragraph of the e-mail,  
19 the final sentence says, "I would be prepared to  
20 facilitate as necessary and to be certain Dreyer's  
21 interests are considered under any assignment restructure  
22 of our overseas distribution."

23 Do you know what is meant by "facilitate" in that  
24 sentence?

25 A. I would presume that Mr. Nealis means facilitate

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1 a communication between the interested parties.

2 Q. Do you know whether Mr. Nealis received a  
3 response from Mr. Sadurni to this e-mail?

4 A. I do not know.

5 Q. Mr. Collette, I'd like to direct your attention  
6 to the second page of the exhibit and ask if you can  
7 identify that, please.

8 A. This appears to be a -- reflect the market share  
9 of various brands in Puerto Rico -- and sales, it appears,  
10 as well.

11 Q. This again is prepared by ACNielsen PR?

12 A. Yes. That's what it appears to be.

13 (Deposition Exhibit 7 was marked for  
14 identification.)

15 MR. GILLES: Q. Mr. Collette, I'd like to show  
16 you what we've marked as Exhibit No. 7 and ask if you  
17 would identify that, please.

18 A. This is an e-mail from Thomas Ward, Payco Foods,  
19 to Robert Nealis, copy to Jorge Sadurni. This is  
20 August 28, 2003.

21 Q. May I see the exhibit, please?

22 Do you know who Mr. Ward is?

23 A. Yes.

24 Q. Who is he?

25 A. He is the head of Payco Foods.

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1 Q. Have you ever met Mr. Ward?  
 2 A. No, I have not.  
 3 (Deposition Exhibit 8 was marked for  
 4 identification.)  
 5 MR. GILLES: Q. Showing you what's marked as  
 6 Exhibit No. 8, would you identify that, please.  
 7 A. This is an e-mail from Robert Nealis to Alberto  
 8 Romaneschi, with copies to Tom Delaplane and Gary Rogers,  
 9 dated August 27, 2003.  
 10 Q. Who is Gary Rogers?  
 11 A. Gary Rogers is the chairman and CEO of Dreyer's  
 12 Grand Ice Cream.  
 13 Q. And who is Alberto Romaneschi?  
 14 A. Romaneschi. He was at the time of this e-mail  
 15 the chief financial officer of Dreyer's Grand Ice Cream.  
 16 Q. How long had he held that position?  
 17 A. At the time of this e-mail, approximately six  
 18 months.  
 19 Q. Do you know where he had worked before?  
 20 A. He had worked for a joint venture of Nestle,  
 21 called Cereal Partners.  
 22 Q. And where was that located?  
 23 A. It was located in Switzerland.  
 24 Q. And how long did he continue to hold that  
 25 position with Dreyer's?

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1 A. For approximately one more year.  
 2 Q. I note at the bottom of the exhibit there appears  
 3 to be a copy. It's an e-mail chain, and there appears to  
 4 be an e-mail that had been sent from Mr. Romaneschi to  
 5 Mr. Nealis with a copy to Mr. Delaplane, dated August 26,  
 6 2003.  
 7 Do you see that?  
 8 A. Yes, I do.  
 9 Q. So the e-mail at the top is in response to the  
 10 e-mail which Mr. Romaneschi sent?  
 11 A. Yes.  
 12 Q. I would direct your attention to -- please read  
 13 the e-mail.  
 14 Mr. Collette, directing your attention to the  
 15 fourth point, it says, "Our annual profit is above 500" --  
 16 Does that mean \$500 million?  
 17 A. No. 500,000.  
 18 Q. 500,000.  
 19 -- "after marketing support of 0.75 per customer  
 20 unit"?  
 21 A. Consumer unit, yes.  
 22 Q. Consumer unit.  
 23 Then directing your attention to the next  
 24 numbered point, No. 5, about the fourth sentence it  
 25 states, "Furthermore, the market needs some level of

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1 'rationalization.'  
 2 Do you see that?  
 3 A. Yes, I do.  
 4 Q. Do you know what Mr. Nealis means by that?  
 5 A. I don't know what he's referring to there.  
 6 Q. Do you have a sense of what the term  
 7 "rationalization" means with respect to a market?  
 8 A. Not specifically, not in this context, no.  
 9 Q. And continuing in the paragraph, there's a  
 10 sentence that says, "It seems to me that we have the  
 11 opportunity to consolidate distribution for our collective  
 12 products at a very minimum."  
 13 Do you see that?  
 14 A. Yes, I do.  
 15 Q. And is he referring to consolidating distribution  
 16 going to both Payco and Sterling?  
 17 MR. ZARLENGA: Object to the form of the  
 18 questions, calls for speculation, and lacks foundation.  
 19 THE WITNESS: I don't know what he's referring  
 20 to.  
 21 MR. GILLES: Q. In 2003, were you directly  
 22 involved in any discussions with Mr. Nealis about  
 23 distribution in Puerto Rico?  
 24 A. No.  
 25 Q. That wouldn't have come to your attention

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1 directly in terms of your responsibilities, would it?  
 2 A. No. It was too small.  
 3 (Deposition Exhibit 9 was marked for  
 4 identification.)  
 5 MR. GILLES: Q. Showing you what we've marked as  
 6 Exhibit No. 9, would you please identify that.  
 7 A. This is a price list for Edy's Grand Ice Cream  
 8 for the Puerto Rico market. Looks like it's dated  
 9 effective in August of 2002. Actually, that's unclear to  
 10 me; there are various dates on here.  
 11 Q. Um-hm.  
 12 A. I'm not sure when it's effective.  
 13 Q. This is a document that Dreyer's would generate?  
 14 A. Yes.  
 15 Q. And it shows the price list to Edy's at or -- at  
 16 the time that is indicated on the document?  
 17 A. Yes. I'm not certain what time that is, though,  
 18 from the caption in the upper right.  
 19 Q. It says "confidential price list." At the time,  
 20 I take it that if someone other than Sterling were to  
 21 contact Dreyer's, you would not provide information, a  
 22 price list in response to a request for that.  
 23 MR. ZARLENGA: Let me object to the question as  
 24 beyond the scope of the deposition notice and overbroad,  
 25 also calling for speculation.



<p style="text-align: right;">Page 38</p> <p>1 THE WITNESS: I don't know the answer to that</p> <p>2 specifically.</p> <p>3 (Deposition Exhibit 10 was marked for</p> <p>4 identification.)</p> <p>5 MR. GILLES: Q. I would like to show you what</p> <p>6 we've marked as Exhibit No. 10, which consists of Dreyer's</p> <p>7 2364 through Dreyer's 2379, the first pages of which</p> <p>8 appear to be an e-mail chain or two e-mail chains, and the</p> <p>9 last pages, beginning on Page 2368, appear to be a</p> <p>10 PowerPoint.</p> <p>11 Can you identify this, please.</p> <p>12 A. This is an e-mail from Felipe Silva, who's a</p> <p>13 market head for Nestle, to individuals at Nestle whom I</p> <p>14 don't know, and Mr. Ward. This is dated Monday,</p> <p>15 September 8, 2003, and the e-mail's also copied to other</p> <p>16 individuals at Nestle.</p> <p>17 Q. It includes a copy to Mr. Nealis, correct?</p> <p>18 A. Yes, it does.</p> <p>19 Q. And it concerns a Dreyer's meeting in Puerto</p> <p>20 Rico?</p> <p>21 A. That's the subject line, yes.</p> <p>22 Q. Directing your attention to the fourth page of</p> <p>23 the exhibit, which is --</p> <p>24 Can you identify that, please?</p> <p>25 A. I'm sorry. I'm not --</p>	<p style="text-align: right;">Page 40</p> <p>1 would direct your attention to the second to the last</p> <p>2 bullet point where it notes "leverage existing</p> <p>3 manufacturing capacity."</p> <p>4 A. Yes.</p> <p>5 Q. Can you explain what that means?</p> <p>6 A. No, I can't.</p> <p>7 Q. Directing your attention to the next page of the</p> <p>8 exhibit, Dreyer's 2371.</p> <p>9 A. Yes.</p> <p>10 Q. And that page is entitled "Puerto Rico"; is that</p> <p>11 correct?</p> <p>12 A. Yes.</p> <p>13 Q. And then directing your attention to the second</p> <p>14 to the last bullet point, it says, "Confusing brand</p> <p>15 alliances between primary distributors."</p> <p>16 Do you see that?</p> <p>17 A. Yes, I do.</p> <p>18 Q. Do you know what's meant by that?</p> <p>19 A. At that time -- at that time, Sterling was the</p> <p>20 distributor of Edy's and Ben &amp; Jerry's. Edy's was</p> <p>21 Dreyer's product; Dreyer's was owned two-thirds by Nestle</p> <p>22 at the time of this. Ben &amp; Jerry's was owned by Unilever,</p> <p>23 Nestle's worldwide rival.</p> <p>24 At the same time, Payco Foods, which was</p> <p>25 affiliated with Nestle -- although I'm not precisely sure</p>
<p style="text-align: right;">Page 39</p> <p>1 Q. It's probably the first page.</p> <p>2 A. Four, this one is four.</p> <p>3 Q. Page 5, it's Page 5.</p> <p>4 A. Okay. This is a title page to a presentation,</p> <p>5 dated September 4, 2003, and the title is "Nestle and</p> <p>6 Dreyer's Caribbean Region Discussion."</p> <p>7 Q. Do you know who prepared this document?</p> <p>8 A. I don't know who prepared the document.</p> <p>9 Q. Do you know if -- whether or not the presentation</p> <p>10 was actually made?</p> <p>11 A. I do not know that specifically.</p> <p>12 Q. All of what you could offer by way of testimony</p> <p>13 about this document today is based on your review of it?</p> <p>14 A. That's correct.</p> <p>15 Q. Directing your attention to the next page, which</p> <p>16 is Dreyer's 2370, would you review that, please.</p> <p>17 A. 2370? My next one was 69, but --</p> <p>18 Q. I'm sorry.</p> <p>19 Directing your attention to Page 2370, which is</p> <p>20 the third page of the slides --</p> <p>21 A. Um-hm.</p> <p>22 Q. -- and it's captioned "International Overview."</p> <p>23 Do you see that?</p> <p>24 A. Yes, I do.</p> <p>25 Q. And there are a number of bullet points, and I</p>	<p style="text-align: right;">Page 41</p> <p>1 whether they were owned by Nestle at that time -- was</p> <p>2 distributing Breyers, owned by Unilever; and Haagen-Dazs,</p> <p>3 which was -- at that time was owned by -- the</p> <p>4 international rights, I believe, General Mills.</p> <p>5 Q. The distributor of a Nestle -- let me start over.</p> <p>6 Why was that confusing?</p> <p>7 A. Because the distributor that was owned or</p> <p>8 controlled by Nestle, Payco Foods, was distributing for</p> <p>9 Unilever, Nestle's rival; and the distributor of the</p> <p>10 Dreyer's, or that was -- had a relationship with Dreyer's,</p> <p>11 which was then owned two-thirds by Nestle, was</p> <p>12 distributing both Dreyer's products and products owned by</p> <p>13 Unilever.</p> <p>14 Q. So Nestle is competing against itself?</p> <p>15 A. I guess that's one way to interpret it, yes.</p> <p>16 Q. Were you involved in any discussions to try and</p> <p>17 deal with this confusion?</p> <p>18 A. Not at that time.</p> <p>19 Q. Since that point in time have you been involved</p> <p>20 in discussions regarding that matter?</p> <p>21 A. No, I have not.</p> <p>22 Q. Are you aware of any other market where Dreyer's</p> <p>23 finds itself in that confusing situation that you just</p> <p>24 described?</p> <p>25 A. Yes.</p>

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1 Q. Where is that market?  
 2 A. China, Hong Kong. Both those markets.  
 3 Q. Were distributors that you -- that are involved  
 4 in distributing Dreyer's product also distributing  
 5 Unilever's product?  
 6 A. Or vice versa, yes.  
 7 (Deposition Exhibit 11 was marked for  
 8 identification.)  
 9 MR. GILLES: Q. Showing you what we've marked as  
 10 Exhibit No. 11, can you identify that, please.  
 11 A. Yes. This is an e-mail from Stanley Pasarell to  
 12 Robert Nealis, September 22, 2003. Subject, it appears to  
 13 be a forward of an e-mail regarding Puerto Rico.  
 14 Q. And this exhibit, Exhibit 11, has Dreyer's  
 15 No. 520 and 521. And directing your attention halfway  
 16 down the page, this appears again to be an e-mail chain.  
 17 Lower on the page there is an e-mail from Robert Nealis to  
 18 Stanley Pasarell regarding Puerto Rico, dated  
 19 September 20, 2003; is that correct?  
 20 A. Yes, that's correct.  
 21 Q. Who is Stanley Pasarell?  
 22 A. Stanley Pasarell is an investor in certain  
 23 businesses. Dreyer's has a distribution relationship with  
 24 him in Chile, and he was a partial investor, I believe, in  
 25 the business in Puerto Rico.

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1 Q. The e-mail from Mr. Pasarell to Mr. Nealis  
 2 appears to be confirming a meeting that's to take place in  
 3 the future; is that correct?  
 4 A. That's what it appears, yes.  
 5 Q. Do you know what the subject of the meeting was?  
 6 A. Puerto Rico. Other than that, no, I don't.  
 7 Q. At this point in time in September of 2003, did  
 8 Mr. Nealis on behalf of Dreyer's have a number of  
 9 conversations with Stanley Pasarell and John Williams  
 10 regarding the potential acquisition of Sterling  
 11 Merchandising?  
 12 A. I'm not aware specifically of conversations  
 13 Mr. Nealis had in that period of time. I'm only aware of  
 14 what the record reflects in terms of the exchanges of  
 15 documents.  
 16 Q. Isn't that something that would have come to your  
 17 attention in your position as secretary of Dreyer's?  
 18 A. I was not the secretary of the corporation. The  
 19 general counsel was the secretary of the corporation.  
 20 Q. But you were -- I'm sorry, I forgot your title.  
 21 A. I was the treasurer.  
 22 Q. Treasurer. In your position as treasurer and  
 23 responsible for banking relationships and financing and so  
 24 on, isn't that something that would have come to your  
 25 attention?

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1 A. Not necessarily. It would depend on the stage of  
 2 the discussion.  
 3 (Deposition Exhibit 12 was marked for  
 4 identification.)  
 5 MR. GILLES: Q. Showing you what's been marked  
 6 as Exhibit 12, could you please identify that.  
 7 A. This is an e-mail from Felipe Silva, the head of  
 8 marketing for Nestle, to Robert Nealis, October of 2003,  
 9 and there's no subject.  
 10 Q. In the -- and this again has another e-mail below  
 11 it, does it not?  
 12 A. Yes.  
 13 Q. That e-mail is from Mr. Nealis to Felipe Silva,  
 14 dated October 11, 2003, correct?  
 15 A. That's correct.  
 16 Q. Referring, though, to Mr. Silva's e-mail, it's  
 17 addressed to Bob, and the first word of the text says  
 18 "Vevey."  
 19 Do you see that?  
 20 A. Yes.  
 21 Q. What's meant by that?  
 22 A. Vevey is a town in Switzerland where Nestle is  
 23 located, its worldwide headquarters.  
 24 Q. Other than what's shown in the documents that  
 25 have been produced, you don't have independent information

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1 regarding the outcome of the discussions that may have  
 2 occurred as reflected in the documents?  
 3 A. No, I do not have that knowledge.  
 4 MR. GILLES: We've been going for a little bit  
 5 over an hour. I would propose a five-minute break.  
 6 (Short recess.)  
 7 (Deposition Exhibit 13 was marked for  
 8 identification.)  
 9 MR. GILLES: Q. Directing your attention to  
 10 Exhibit 13, would you please identify that.  
 11 A. This is an e-mail from Ivan Galinovic to Robert  
 12 Nealis, September 10, 2003, and the subject is Dreyer's.  
 13 Q. Who's Mr. Galinovic?  
 14 A. I am not aware of Mr. Galinovic.  
 15 Q. In the first line of the e-mail, it refers to a  
 16 Tahira?  
 17 A. Yes.  
 18 Q. Do you know who that is? Who is that?  
 19 A. Tahira Hassan.  
 20 Q. What is her position?  
 21 A. She works for an entity of Nestle; I'm not sure  
 22 which one.  
 23 Q. Is she also a member of the board of Dreyer's?  
 24 A. At the time of this e-mail, she was a member of  
 25 the board of Dreyer's.

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1 Q. When did she assume that position and when did  
2 she leave it?

3 A. She assumed that position when the transaction  
4 with Nestle closed in June of 2003. And I am not -- I  
5 don't recall specifically when she left the board.

6 Q. Approximately two or three years ago?

7 A. Approximately a year after she assumed the  
8 position.

9 Q. After the transaction in 2004 when Ms. Hassan  
10 assumed the position, did other Nestle employees assume  
11 positions on the board?

12 A. Yes. The transaction was in 2003, closed in June  
13 of 2003, and at that time the board of directors was  
14 comprised of ten members. Of these ten members, five of  
15 those members were appointed by Nestle and confirmed by  
16 the shareholders.

17 Q. And does that -- how has the composition of the  
18 board changed since that point in time?

19 A. The five members that were appointed by Dreyer's  
20 and confirmed by Dreyer's have not changed. The five  
21 members that were appointed by Nestle have all changed.

22 Q. The composition today remains the same with five  
23 Nestle appointees?

24 A. No. As of the beginning of January of 2006, when  
25 Nestle acquired the remaining one-third of common stock

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1 through the exercise of the put, then the board of  
2 directors became a fiduciary board of directors. So the  
3 company had one shareholder only, Nestle, and the  
4 composition of the board then again changed in terms of  
5 the actual people on the board, particularly from Nestle,  
6 and today it is a fiduciary board.

7 Q. And who are the board members today?

8 MR. ZARLENGA: I'm going to object to the form of  
9 the question as beyond the scope of the deposition notice.

10 THE WITNESS: The directors from -- that were  
11 appointed by Dreyer's and confirmed by the shareholders  
12 and continued as fiduciary board members are Gary Rogers,  
13 the CEO of Dreyer's; William F. Cronk, C-R-O-N-K, the  
14 former president of Dreyer's Grand Ice Cream; John Larson,  
15 an independent director; Tim Smucker, an independent  
16 director; and Jan Booth, an independent director.

17 The members of the board of directors that are  
18 appointed by Nestle subsequent to replace -- subsequently  
19 to replace other members are currently Mr. Jim Singh,  
20 S-I-N-G-H, an employee of an entity of Nestle; Mr. Paul  
21 Bulcke, B-U-L-K-E [sic], who's currently the head of Zone  
22 Americas for Nestle; Mr. Jean-Marie Gurnei (phonetic), I  
23 believe it's G-U-R-N-E-I, who is the head of the ice cream  
24 strategic business unit for Nestle; Mr. Brad Alford, I  
25 believe. I don't recall the balance of the -- I'm not

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1 sure if Mr. Alford is. Mr. Joe Weller was and still may  
2 be.

3 MR. GILLES: Q. Okay.

4 (Deposition Exhibit 14 was marked for  
5 identification.)

6 MR. GILLES: Q. I'd like to show you what's  
7 marked as Exhibit 14. Would you please identify the  
8 exhibit.

9 A. This is an e-mail from John Williams to Bob  
10 Birchbauer with a copy to Greg Frick and Stanley Pasarell,  
11 dated April 20, 2004, and the subject is "Re price  
12 increase."

13 Q. Note the exhibit is Dreyer's 2006 through  
14 Dreyer's 2007, and directing your attention to the second  
15 page of the exhibit --

16 A. Um-hm.

17 Q. -- is that an e-mail from Mr. Birchbauer to  
18 Mr. Williams, dated April 19, 2004, subject, "Promotional  
19 support charge"?

20 A. Yes, that's correct.

21 Q. And does that reflect a change in the payment  
22 terms relating to Sterling's purchase of Edy's ice cream?

23 A. No. Not to the payment terms, no.

24 Q. What does it communicate?

25 A. It communicates a change in the per unit

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1 allowance arrangement between Edy's and Sterling.

2 Q. Could you explain how that worked before this  
3 change?

4 A. Before the change it was \$0.75 per unit, and  
5 after the change it was \$0.65 per unit.

6 Q. How would -- if Sterling received a bill for  
7 product that it ordered, how would the allowance be shown  
8 on the bill?

9 A. The allowance wouldn't be shown on the bill for  
10 the products. The allowance would have been subsequently  
11 shown on a credit memo or other such document.

12 Q. So Sterling would pay the face amount of the bill  
13 and sometime later receive a credit based on the  
14 allowance?

15 A. Sterling would pay -- they would -- no, not  
16 exactly. They would deduct from the amount of the payment  
17 the specific amount referenced in the credit memo.

18 Q. Directing your attention, sir, to the first page  
19 of the exhibit --

20 A. Um-hm.

21 Q. -- in Mr. Williams's e-mail to Mr. Birchbauer at  
22 the end of the first paragraph, it states, "However, we  
23 are still way short of the goal of 90 to 95 percent ABC  
24 [sic] that we agreed we would reach before increasing  
25 prices."

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1 Do you see that?

2 A. Yes, I do.

3 Q. Do you know what's meant by AB -- ACV?

4 A. ACV is all commodities volume.

5 Q. What does all commodities volume mean?

6 A. All commodities volume is a measure which is

7 the -- which shows -- how can I explain this?

8 It shows what percentage of goods are being sold,

9 all goods that are being sold in a market, what percentage

10 are being sold at a particular store or particular chain

11 or particular place.

12 Q. So by -- what do you understand by 95 percent

13 ACV?

14 A. It means that products would be available at

15 retail outlets which would, on a cumulative basis, be

16 selling 90 to 95 percent of all of the total dollar volume

17 that is sold in a particular market.

18 Q. That would be the total volume for a particular

19 category like ice cream?

20 A. No. Of all products.

21 Q. All products?

22 A. All products sold in the store.

23 Q. Does Dreyer's keep track of that particular

24 measure?

25 A. Yes.

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1 Q. How do you keep track of that with respect to

2 various markets?

3 A. That's a -- a statistic that is reported through

4 standard market reporting, market research reporting.

5 Q. So would Dreyer's obtain that statistic from

6 ACNielsen?

7 A. At the time of this e-mail, yes; today, no.

8 Q. Who does Dreyer's get that information from

9 today?

10 A. IRI.

11 Q. With respect -- when it receives ACV information

12 from -- when it received ACV information in the past, say

13 in 2004 from ACNielsen, what markets -- I mean, how

14 localized were the markets that were the subject of the

15 statistic?

16 A. ACV volume is measured for whatever market the --

17 whoever subscribes to ACNielsen asks it to be measured

18 for, based on scanning data collected by the grocers. It

19 only covers grocery trade. It does not cover other than

20 the grocery trade where there's no scanning available.

21 Q. With respect to Puerto Rico, would it cover the

22 entire island?

23 A. It would cover only the grocery trade where

24 scanning data was available.

25 Q. Would the specific -- what would the form of

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1 the -- let me start over.

2 How often would you get -- would Dreyer's receive

3 ACV reports?

4 MR. ZARLENGA: Object to the form of that

5 question is overbroad in scope.

6 THE WITNESS: When -- it was regularly available

7 from Neilsen if they asked for it.

8 MR. GILLES: Q. Do you know whether Dreyer's

9 asked for ACV reports with respect to Puerto Rico?

10 A. I do not know, do not know.

11 Q. Bob Nealis would know?

12 A. He may know.

13 Q. Who else at Dreyer's would know whether they

14 received ACV reports for Puerto Rico?

15 A. I'm not aware of anybody who would know for this

16 time.

17 (Deposition Exhibit 15 was marked for

18 identification.)

19 MR. GILLES: Q. I would like to show you what's

20 marked as Exhibit 15 and ask if you can identify this,

21 please.

22 A. This is an e-mail from John Williams to Robert

23 Nealis with copies to Stanley Pasarell and Greg Frick,

24 dated May 24, 2004, and the subject is "Puerto Rico Law 75

25 and the U.S. Virgin Islands."

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1 Q. Directing your attention to the second page of

2 the exhibit, which is -- begins on Dreyer's 500 and

3 continues through Dreyer's 502.

4 Do you see that?

5 A. Yes, I do.

6 Q. Is that a correspondence that Mr. Nealis received

7 from Mr. Williams sometime in May of 2004?

8 A. I can't -- I cannot confirm the date. There's no

9 date on the letter and it's unsigned.

10 Q. Before the break, there were some -- and I'll

11 find the particular -- well, there was one exhibit that

12 referred to a meeting in Puerto Rico involving Mr. Nealis,

13 Stanley Pasarell, and I believe it was Mr. Silva.

14 Do you remember that?

15 A. I remember there was an e-mail that was

16 discussing having a meeting.

17 Q. And you don't know whether the meeting actually

18 took place?

19 A. No, I do not.

20 Q. Were you aware in February of 2004 whether

21 employees of Payco met with Dreyer's executives concerning

22 the distribution of ice cream in Puerto Rico?

23 A. I'm not aware of a meeting. I'm only aware of

24 the contents of the communications.

25 Q. So unless it's reflected in the documents, you



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1 don't have any additional information regarding meetings  
2 that may have taken place sometime in February or March  
3 of 2004 between Dreyer's executives and Payco executives?

4 A. No. I'm sorry, I don't. Only what's reflected  
5 in the record.

6 (Deposition Exhibit 16 was marked for  
7 identification.)

8 MR. GILLES: Q. I'd like to show you what we've  
9 marked as Exhibit 16 and ask if you can identify that,  
10 please.

11 A. This is a -- an e-mail from Tahira Hassan to  
12 Felipe Silva, with copies to Chris Lewis, Alice Fry, Tom  
13 Delaplaine, and Stephen Raffe, dated June 9, 2004, with a  
14 subject line which is a forward, "Ice cream exports from  
15 the USA to the Caribbean region."

16 Q. Would you please review the e-mail. It's an  
17 e-mail chain that's depicted on the exhibit which begins  
18 with Dreyer's 2327 and continues through 2328.

19 A. Okay.

20 Q. Directing your attention to the bottom of the  
21 page, there's an e-mail from Mr. Carlos Represas to Joe  
22 Weller, Paul Bulcke, Tahira Hassan.

23 Do you see that?

24 A. Yes, I do.

25 Q. And Paul Bakus?

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1 A. Bulcke.

2 Q. Pardon?

3 A. Oh, Bakus, Paul Bakus.

4 Q. Who is Mr. Represas?

5 A. I believe Mr. Represas was the head of the Zone  
6 Americas for Nestle at that time.

7 Q. I note in the first paragraph it says that "This  
8 confirms our verbal agreement last week in New York that  
9 all ice cream exports ex-Dreyer's will be managed directly  
10 with the Caribbean region and not via Nestle foreign  
11 trade."

12 Do you see that?

13 A. Yes, I do.

14 Q. That was a change in approach with respect to  
15 distribution in the Caribbean?

16 MR. ZARLENGA: I'll object to the form of the  
17 question as beyond the scope of the deposition notice.

18 THE WITNESS: In terms of how Nestle was handling  
19 its distribution?

20 MR. GILLES: Q. Yes.

21 A. Yes.

22 Q. At that time Dreyer's was manufacturing Nestle  
23 products, correct?

24 A. Yes. As of the time of this e-mail, yes.

25 Q. But it was being distributed through Nestle,

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1 Nestle foreign trade?

2 A. Yes. Certain of those product, yes.

3 Q. And some problems arose with respect to that  
4 arrangement?

5 A. I have no information regarding problems or a  
6 reason for this.

7 Q. But at this point in time or at some point in  
8 time after this e-mail, which was in June 2004, Dreyer's  
9 began to manage directly the shipment of Nestle product to  
10 the Caribbean?

11 A. Yes.

12 Q. I would direct your attention to the top of the  
13 exhibit, Mr. Collette, and specifically the last paragraph  
14 on the e-mail from Ms. Hassan to Felipe Silva and others,  
15 and the last sentence where it says, "Felipe and Bob, I  
16 appreciate your efforts in identifying and coordinating  
17 this business improvement and trust you will provide an  
18 update on the actual results achieved at the end of the  
19 year."

20 Do you see that?

21 A. Yes, I do.

22 Q. Do you know what efforts they were attempting to  
23 coordinate?

24 A. It refers to the change of the distribution of  
25 the products.

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1 Q. Wouldn't refer to efforts to coordinate  
2 distribution with Sterling?

3 A. I couldn't speculate on that. I don't know.  
4 (Deposition Exhibit 17 was marked for  
5 identification.)

6 MR. GILLES: Q. I would like to show you what  
7 we've marked as Exhibit 17 and ask would you please  
8 identify this.

9 A. This was an e-mail from Greg Frick to Robert  
10 Nealis, dated November 22, 2004, and the subject line is  
11 "Price increase for Puerto Rico."

12 Q. And then this also includes an e-mail from John  
13 Williams, dated November 17, 2004, to Bob Birchbauer and  
14 Greg Frick; is that correct?

15 A. Yes. With a copy to Stanley Pasarell.

16 Q. In the first sentence of Mr. Frick's e-mail, it  
17 requests Mr. Nealis to respond to John's request regarding  
18 Skinny Cow.

19 Do you see that?

20 A. Yes, I do.

21 Q. What is Skinny Cow?

22 A. Skinny Cow is an ice cream novelty product.

23 Q. And is that a product that at this time Dreyer's  
24 manufactured?

25 A. Yes, it is.

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1 Q. Did it acquire it from some other manufacturer?  
 2 A. Dreyer's acquired the company Silhouette Brands,  
 3 Incorporated, and Skinny Cow is a product of Silhouette  
 4 Brands, Incorporated. It's a trade name.

5 Q. Did an issue develop as to who would handle this  
 6 product in Puerto Rico at about this time?

7 A. I'm not aware of the issue that developed, no.

8 Q. Now, I note in Mr. Williams's letter of  
 9 November 17, the subject line is "Price increase for  
 10 Puerto Rico," correct?

11 A. Yes.

12 Q. And at that time, had Mr. Williams been notified  
 13 of a price increase with respect to his product?

14 A. He may have. I'm not specifically sure.

15 Q. I direct your attention to the last two  
 16 paragraphs on the page and ask you to review that, please.

17 A. Okay.

18 Q. In a prior e-mail, there was a reference to an  
 19 allowance being changed.

20 A. Yes.

21 Q. And that was in the -- earlier in 2004, correct?

22 A. Yes.

23 Q. And here Mr. Williams is referring to another  
 24 price, \$0.05 a unit price change, correct?

25 A. Yes, that's what he's referring to.

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1 Q. And do you know whether or not that price change  
 2 was implemented?

3 A. I believe it was.

4 Q. And --

5 A. It's a change in the allowance. It was a change  
 6 in the allowance.

7 Q. So it was a further reduction in the allowance?

8 A. Yes. As was the first one he referred to.

9 Q. Now, in the paragraph before the last paragraph,  
 10 Mr. Williams states, "As I'm sure you'll recall, Stanley  
 11 and I wanted to know if the price was going to be  
 12 increased in the U.S. What you told us was that you  
 13 wouldn't be increasing your list price in the U.S., but  
 14 the effect would be the same because you would promote  
 15 less."

16 Do you see that?

17 A. Oh, in this paragraph. I'm sorry, yes.

18 Q. So at the time the allowance was decreased for  
 19 Sterling, were there other -- there were no other price  
 20 changes for other distributors in the United States; is  
 21 that correct?

22 A. I couldn't speak to that. I don't know.

23 (Deposition Exhibit 18 was marked for  
 24 identification.)

25 MR. GILLES: Q. I would like to show you what's

Page 60

1 marked as Exhibit 18. Would you please identify this.  
 2 It's Dreyer's 2419 through Dreyer's 2421.

3 A. This is a letter on Edy's letterhead addressed to  
 4 Mr. John Williams at Sterling, dated November 29, 2004,  
 5 and it is from Mr. Bob Birchbauer with copies to Greg  
 6 Frick and Stanley Pasarell.

7 Q. Is this in response to the Exhibit No. 17, the  
 8 November 17 e-mail from Mr. Williams to Mr. Birchbauer  
 9 that begins "Dear Greg and Bob"?

10 A. November 17, November 29. Well, could be. He  
 11 doesn't specifically say in the letter that it's in  
 12 response to this e-mail. He just simply refers to "your  
 13 last letter to Greg and myself." I don't know if this is  
 14 the last letter to Greg and himself.

15 Q. The letter sets out information regarding the  
 16 price and other information about Edy's support for  
 17 Sterling's efforts in Puerto Rico, correct?

18 A. Yes, it does.

19 Q. And I note that in any -- at least in the initial  
 20 paragraph under 1999, there's a reference to the ACV,  
 21 50 percent ACV.

22 Do you see that?

23 A. Yes, I do.

24 Q. What do you understand when it says "Payco has  
 25 bought out Sterling in approximately 50 percent ACV"?

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1 A. I don't know what the term "bought out" means.  
 2 The term "50 percent ACV" refers to the measure that we  
 3 discussed earlier, as in retail outlets selling 50 percent  
 4 of all the volume sold in that market.

5 Q. You don't know how that measure was calculated?

6 A. The measure itself would have been calculated, as  
 7 we discussed earlier, through the collection of data in  
 8 the grocery trade, yeah.

9 Q. Are you aware of a practice of setting up  
 10 exclusive distribution agreements with retail outlets in  
 11 Puerto Rico?

12 A. Not specifically.

13 Q. So what do you -- do you have an -- did  
 14 Mr. -- strike that.

15 Has it come to your attention that Payco on  
 16 occasion has had an agreement with a retail chain in  
 17 Puerto Rico that would limit the chain from acquiring  
 18 product from other distributors?

19 A. There are references in the record to Payco  
 20 having agreements with retailers over that period. I'm  
 21 aware of those.

22 Q. But beyond that, you have no  
 23 independent information?

24 A. No, I have no independent knowledge of that, no.

25 Q. And you -- who at Dreyer's would have information

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1 concerning that matter?

2 A. No one at Dreyer's that I'm aware of today would

3 have that information. Mr. Nealis would perhaps know.

4 Q. Do you know whose file this particular exhibit

5 came from, these documents came from?

6 A. Not specifically, no.

7 Q. Who was responsible for gathering documents

8 together to respond to the subpoena?

9 A. The documents were gathered by the office of the

10 assistant general counsel at Dreyer's.

11 Q. What's his name?

12 A. Her name.

13 Q. Her name?

14 A. Heidi Zuber, Z-U-B-E-R. She's the associate

15 general counsel.

16 (Deposition Exhibit 19 was marked for

17 identification.)

18 MR. GILLES: Q. I'm showing you what's been

19 marked as Exhibit 19, which bears Dreyer's 40 through 41.

20 Would you identify this, please.

21 A. This is an e-mail chain, the last of which is an

22 e-mail from Stan Krause to Robert Nealis, Charles

23 Woodward, Bob Birchbauer, dated May 27, 2005, subject

24 Denny's.

25 Q. Who is Stan Krause?

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1 A. Stan Krause is a -- an employee of the

2 food-service division of Dreyer's.

3 Q. How long has he worked at Dreyer's?

4 A. I don't have that information.

5 Q. Where is he -- where does he report to?

6 A. He reports in the food-service group itself.

7 There's a specific group.

8 Q. Are they located in Oakland?

9 A. Yes, they are.

10 Q. And his office would be in Oakland?

11 A. No. His office would be, I believe, in Florida.

12 Q. And what are his general responsibilities?

13 A. Sale of food-service products.

14 Q. How do you distinguish food-service product from

15 Edy's ice cream that you buy in the grocery store?

16 A. Products that are sold typically in bulk to

17 restaurants, to food-service outlets, schools, things of

18 that nature, where the product is served as opposed to

19 purchased for -- is served for consumption on-premises.

20 Q. Is it primarily in 3-gallon containers?

21 A. That's primary business, yes.

22 Q. Are there -- is it -- is there a particular brand

23 associated with the food-service product?

24 A. There are a number of brands, Edy's, Haagen-Dazs.

25 Q. So there are counterparts to the --

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1 A. Yes, they're complements of retail consumer

2 brands.

3 Q. Now, I would direct your attention to the bottom

4 of the -- well, to the second page of the exhibit, and --

5 which is an e-mail from Stan Krause to Charles Woodward,

6 Robert Nealis, and Bob Birchbauer, dated May 27, 2005.

7 Who is Charles Woodward?

8 A. He works in the food-service group, Dreyer's

9 Grand Ice Cream, in Oakland.

10 Q. And would you please review the e-mail.

11 A. Okay.

12 Q. The second to last sentence there says, "Is there

13 any way that we can enforce a walk-in, walk-out policy

14 with Pico," P-I-C-O, "we are hurting ourselves?"

15 Do you see that?

16 A. Yes, I do.

17 Q. Do you know what he's referring to by "a walk-in,

18 walk-out policy with Pico"?

19 A. I don't know what that term is. I have no direct

20 knowledge of that.

21 Q. Prior in the e-mail, it stated that he was just

22 informed from Sterling that Edy's lost Denny's business

23 for Payco on tubs, right?

24 A. Yes.

25 Q. I take it that means that Sterling had been

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1 supplying Denny's prior to this date and now it would in

2 the future be supplied by Payco.

3 MR. ZARLENGA: You're saying Payco, but this says

4 P-I-C-O. I'm not sure one is equivalent to the other, so

5 I'm going to object to that as a possible

6 mischaracterization.

7 MR. GILLES: I did note when I read the sentence

8 what the spelling was.

9 THE WITNESS: As to the substance, it's not clear

10 what they're supplying Denny's with.

11 MR. GILLES: Q. Directing your attention, then,

12 to the first page of the exhibit, which is Mr. Nealis and

13 Mr. Nealis' e-mail of May 27, 2005, to Stan Krause,

14 Charles Woodward, and Bob Birchbauer, dated, as I

15 mentioned, May 27, 2005.

16 Do you see that?

17 A. Yes, I do.

18 Q. And about halfway through the e-mail, it states,

19 "We cannot be in a position of approaching them" --

20 I think Mr. Nealis's e-mail uses the term Payco,

21 spelled P-A-Y-C-O. Is that correct?

22 A. Yes, that's correct.

23 Q. And again continuing in the e-mail, he states,

24 "We cannot be in a position of approaching them for any

25 sort of cooperative market treatment of customers. If you

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1 need more information, perhaps we should discuss by  
2 phone."  
3 Do you see that?  
4 A. Yes.  
5 Q. Do you know whether there was a consideration to  
6 have cooperative market treatment of customers between  
7 Payco and Sterling?  
8 A. No. Not from -- no, I don't know. I couldn't  
9 read that out of what you just read or what you just asked  
10 me to read there.  
11 Q. And independent of this, you don't have any  
12 information regarding cooperative treatment of Payco and  
13 Sterling?  
14 A. Let me make sure I understand your question.  
15 Q. Let me restate it.  
16 A. Okay.  
17 Q. Beyond what's set out in this e-mail, you don't  
18 have any information regarding cooperative market  
19 treatment between Payco and Sterling?  
20 A. Between Payco and Sterling, no.  
21 Q. Directing your attention to the next e-mail where  
22 it's Mr. Krause, dated -- from Mr. Krause, dated May 27,  
23 2005, to Mr. Nealis, Charles Woodward, and Mr. Birchbauer.  
24 A. Um-hm.  
25 Q. In this e-mail, he explains or he states,

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1 "Walk-in, walk-out simply means if Sterling or Payco see  
2 our products in a location they leave it alone."  
3 Are you aware of any policy like that that  
4 Dreyer's would have in place with respect to other  
5 products?  
6 A. Dreyer's doesn't have any policy like that.  
7 Q. Just to complete, going up the next e-mail,  
8 Mr. Nealis, dated May 27, 2005, to Stan Krause, Charles  
9 Woodward, Bob Birchbauer, says, "Thanks for the  
10 explanation. But just to be clear, Payco" -- P-A-Y-C-O --  
11 "is a competitor and they are not selling Edy's. Why  
12 would we agree to walk from an Edy's account more" -- "Why  
13 would they agree to walk away from an Edy's account any  
14 more than Sterling would not try to take away any Payco  
15 account?"  
16 And then the next e-mail from Mr. Krause to  
17 Mr. Nealis with a copy to Charles Woodward and Bob  
18 Birchbauer, subject Denny's, his response is, "Because we  
19 are all partners supporting Nestle."  
20 Right?  
21 A. Well, what do you mean by "right"?  
22 Q. That's what the e-mail says.  
23 A. That's what Stan Krause's e-mail says.  
24 Q. Right.  
25 A. But that contradicts what Mr. Nealis said in his

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1 prior e-mail.  
2 Q. Apart from the e-mail, do you have any  
3 information at all about Dreyer's position on what  
4 Mr. Krause refers to as a walk-in, walk-out policy?  
5 A. Not specifically on a walk-in, walk-out policy.  
6 What Mr. Nealis states here is that Payco and  
7 Sterling are competitors and therefore Dreyer's would  
8 compete with -- would compete with them on an arm's-length  
9 basis in that circumstance.  
10 (Deposition Exhibit 20 was marked for  
11 identification.)  
12 MR. GILLES: Q. Is Mr. Krause still employed by  
13 Dreyer's?  
14 A. I'm not aware of that. I don't know.  
15 Q. I'd like to show you what we've marked as  
16 Exhibit 20 and ask you to identify that, please.  
17 A. This is an e-mail from Stan Krause to John  
18 Williams and Robert Nealis with copies to Bob Birchbauer  
19 and Charles Woodward, dated April 7, 2005, regarding price  
20 increases.  
21 Q. And below that is an e-mail from John Williams to  
22 Mr. Birchbauer, Stan Krause, and Robert Nealis, dated  
23 April 7, 2005, subject "Price increases"; is that correct?  
24 A. Yes.  
25 Q. And referring to Mr. Krause's e-mail of April 7,

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1 2005, the first sentence reads, "Bob N, can we do anything  
2 to back off Payco" -- P-A-Y-C-O -- slash, "Nestle? We've  
3 backed off many opportunities with SYSCO because of the  
4 international rules here. Please help. Stan."  
5 Do you see that?  
6 A. Yes, I do.  
7 Q. Who is SYSCO, S-Y-S-C-O, or what is SYSCO?  
8 A. SYSCO is a large food-service distributor.  
9 Q. And do they compete with Dreyer's?  
10 A. SYSCO distributes products in certain markets for  
11 Dreyer's, and certain markets they would compete with  
12 them. They would be distributing products of other  
13 manufacturers.  
14 Q. Do you know what Mr. Krause means when he refers  
15 to international rules here?  
16 A. I do not.  
17 Q. The sentence reads, "We backed off many  
18 opportunities with SYSCO because of international rules  
19 here. Please help."  
20 Who would you ask at Dreyer's to get more  
21 information about this statement?  
22 A. I don't know who I would ask about that specific  
23 statement.  
24 Q. It seems to me that Mr. Krause is saying they  
25 have an arrangement with SYSCO that Dreyer's is not



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1 competing with SYSCO.  
2 MR. ZARLENGA: Let me object to that question as  
3 argumentative, lacking foundation, and going beyond the  
4 scope of the deposition notice.

5 THE WITNESS: I can't infer that from the word  
6 "opportunities."

7 MR. GILLES: Q. What do you understand by it?

8 A. I don't actually understand what he's referring  
9 to. It doesn't make sense to me.

10 (Deposition Exhibit 21 was marked for  
11 identification.)

12 MR. GILLES: Q. Showing you what's been marked  
13 as Exhibit 21, which bears Dreyer's numbers 2025 through  
14 2030, and ask you to identify that, please.

15 A. This is an e-mail from Karen O'Keefe to Bob  
16 Birchbauer and Robert Nealis with copies to Kerri Ortiz  
17 and Sally Graham, dated June 27, 2005, and the subject  
18 matter is "Sterling -- Dibs pricing."

19 Q. What is Dibs?

20 A. Dibs is a novelty product manufactured by  
21 Dreyer's Grand Ice Cream, which are bite-sized ice  
22 cream -- coated ice cream pieces.

23 Q. And it's relative recent, new product?

24 A. Yes. Within -- well, recent, two years.

25 Q. So at this time, before this time, Sterling had

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1 Q. -- would you please identify that?

2 A. This is a -- entitled "Subdistributor Report,  
3 Year-to-Date 2005, Total Merchandising Units." It's an  
4 Excel spreadsheet, dated April 8, 2005.

5 Q. Does this reflect total sales as opposed to any  
6 particular distributor?

7 A. I'm not sure. It refers to merchant  
8 distributors, in the plural, in the first column heading.

9 Q. Well, let's see -- do you see on the -- on  
10 Page 2029 on the top left column, "Houston," and then it  
11 has "Sterling Merchandising."

12 Do you see that?

13 A. Yes.

14 Q. So Sterling acquires its product from a facility  
15 in -- a Dreyer's facility in Houston?

16 A. Houston manufacturing facility for Dreyer's, yes.

17 Q. Is that the same location that Payco would  
18 acquire its product from?

19 A. You have to be more specific about that.

20 Q. In terms of particular product line or --

21 A. Some products. Other products would be  
22 manufactured in other Dreyer's locations.

23 (Deposition Exhibit 22 was marked for  
24 identification.)

25 MR. GILLES: Q. I'd like to show you what's

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1 not -- strike that.

2 In June of 2005, the date of the e-mail, is that  
3 about the time that the product was being introduced?

4 A. Roughly. I'm not totally sure of that time  
5 frame.

6 Q. The e-mail chain here reflects how the price to  
7 Sterling was arrived at, does it not?

8 A. Give me a moment.

9 Q. Please.

10 A. Let me take a scan here.

11 Yes, this is a derivation of the distributor  
12 price point.

13 Q. In the e-mail at the top of the page where it  
14 says there would be a \$.12 -- would be -- it arrives at a  
15 \$.12 figure. What does that represent?

16 A. It represents the reduction in the price to  
17 Sterling that is attributed to the freight cost of the  
18 product being shipped to Puerto Rico, and the price is  
19 being reduced because Sterling bears the freight cost  
20 itself. So they're equalizing the price to the national  
21 distributor price where Dreyer's pays the freight of  
22 \$1.99, \$.12 higher.

23 Q. Directing your attention to the next page of the  
24 exhibit --

25 A. Um-hm.

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1 marked as Exhibit 22, which consists of Dreyer's 1057  
2 through Dreyer's 1059. Would you identify that, please.

3 A. This is an e-mail from Robert Nealis to Tom  
4 Delaplane, dated Wednesday, August 24, 2005 with a subject  
5 line "Visit."

6 Q. And directing your attention down the page, there  
7 appears to be an e-mail from Valerie Cornut, C-O-R-N-U-T,  
8 dated August 24, 2005, to Robert Nealis, subject "Visit."

9 Do you see that?

10 A. Yes, I do.

11 Q. Do you know whether Ms. Cornut came to visit  
12 Dreyer's during September of 2005?

13 A. No, I do not know.

14 Q. Do you know who she -- have you met her?

15 A. No. I do not know who she is.

16 Q. I note in that -- in the -- in Ms. Cornut's  
17 e-mail to Mr. Nealis, of August 24, 2005, the last  
18 sentence of that references, "I will be flying to the  
19 steering committee from SFO on Monday the 26th."

20 Do you see that?

21 A. Um-hm.

22 Q. What is the steering committee?

23 A. I have no idea.

24 (Deposition Exhibit 23 was marked for  
25 identification.)

<p style="text-align: right;">Page 74</p> <p>1 MR. GILLES: Q. Showing you what's been marked 2 as Exhibit 23, would you please identify that. 3 A. This is an e-mail from Christine Hart to Robert 4 Nealis with a copy to David Markley, M-A-R-K-L-E-Y, 5 January 24, 2006, subject line, "Sterling Merchandise." 6 Q. Who is Christine Hart? 7 A. Christine Hart works in the southeast division of 8 Dreyer's Grand Ice Cream. 9 Q. David Markley? 10 A. David Markley no longer works for Dreyer's. He 11 worked in the same division. 12 Q. Directing your attention to the second page of 13 the exhibit, the exhibit bears -- it consists of Dreyer's 14 1781 through Dreyer's 1785. 15 Would you identify what appears at Page 1782, the 16 second page of the exhibit. 17 A. The second page. Oh, this, you can't see the 18 numbers on the bottom of this one. 19 Q. Oh. 20 A. This is -- it appears to be a price table for 21 Sterling Merchandising with some text above the beginning 22 of the history, the price history. It starts in 2000. 23 Q. Did Christine Hart have access to Sterling's 24 purchase records to be able to compile information 25 regarding that?</p>	<p style="text-align: right;">Page 76</p> <p>1 A. I don't know whether the meeting took place. 2 (Deposition Exhibit 25 was marked for 3 identification.) 4 MR. GILLES: Q. I would like to show you what's 5 marked as Exhibit 25. It bears Dreyer's No. 633 and 634, 6 and would you please identify that. 7 A. Yes. This is an e-mail chain headed by an e-mail 8 from Paul Giomi, G-I-O-M-I, to Robert Nealis, on March 10, 9 2006. And the subject line is "Wal-Mart group/Dreyer's 10 organization." 11 Q. And this again is an e-mail chain. And directing 12 your attention to the second page of the exhibit, the 13 first message is one from Jose Flores to Paul Giomi, dated 14 February 28, 2006, of the same subject. 15 Do you see that? 16 A. Yes. 17 Q. Who is Jose Flores? 18 A. Jose Flores is an employee of Payco Foods. 19 Q. Do you know his position at Payco? 20 A. I do not. 21 Q. I note that there are two numbered items on the 22 e-mail, and the second item is a Dreyer's organizational 23 chart. Do you see that? 24 A. Yes, I do. 25 Q. Does Dreyer's have an organizational chart?</p>
<p style="text-align: right;">Page 75</p> <p>1 A. Yes, she would have, yes. 2 Q. Do you have a sense of what the purpose of -- why 3 Mr. Nealis sought this information? 4 A. He was in charge of the business. 5 Q. Who is Lee Partin? 6 A. Lee Partin is the general manager in the eastern 7 division of Dreyer's Grand Ice Cream. 8 (Deposition Exhibit 24 was marked for 9 identification.) 10 MR. GILLES: Q. I'm showing you what's marked as 11 Exhibit 24. Would you please identify that. The exhibit 12 has Bates No. Dreyer's 762 and 763. 13 A. This is headed by an e-mail from Robert Nealis to 14 Stanley Pasarell, dated March 6, 2006, and the subject 15 line is "Palm 7:00 p.m. -- 3.21." 16 Q. And referring to the second page of the exhibit, 17 Dreyer's 763 is an e-mail chain. Begins with an e-mail 18 from Robert Nealis to Mr. John Williams with a carbon copy 19 to Lee Partin and a copy to Stanley Pasarell, regarding a 20 visit to Puerto Rico; is that correct? 21 A. Yes. 22 Q. Had Lee Partin taken Mr. Birchbauer's place at 23 that time? 24 A. I don't know specifically. 25 Q. Do you know whether the meeting took place?</p>	<p style="text-align: right;">Page 77</p> <p>1 A. Yes, it does. 2 Q. Then directing your attention to the first page 3 of the exhibit -- 4 A. Um-hm. 5 Q. -- there's another e-mail from Mr. Flores to 6 Paul -- to Mr. Giomi, dated March 6, 2006. Do you see 7 that? 8 A. Yes. 9 Q. That's just -- it appears to be a follow-up, does 10 it not? 11 A. Take a second. Just a continuing discussion, 12 yeah. 13 Q. Directing your attention to Mr. Giomi's, the 14 first -- or the e-mail that is the most recent in time, 15 Mr. Giomi's e-mail to Mr. Nealis, of March 10, 2006 -- 16 A. Yes. 17 Q. -- it states, "I'm going to ignore this request." 18 A. Yes. 19 Q. Do you see that? 20 A. Yes, I do. 21 Q. Why would Mr. Giomi ignore the request? 22 A. I don't know. I'm not aware. 23 Q. Are you aware of any reason why Dreyer's would 24 not give Payco an organization chart? 25 A. I'm not aware of why they would request it nor</p>

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1 why we would respond that way.  
 2 (Deposition Exhibit 26 was marked for  
 3 identification.)  
 4 MR. GILLES: Q. Showing you what's been marked  
 5 as Exhibit 26, would you please identify that.  
 6 A. This is an e-mail from Lee Partin to Robert  
 7 Nealis, dated March 16, 2006, subject, "Sterling 2005  
 8 sales.xls."  
 9 Q. And this exhibit is Dreyer's Exhibit 448  
 10 through 451.  
 11 Directing your attention then to the second page  
 12 of the exhibit, Dreyer's 449, would you identify that,  
 13 please.  
 14 A. This appears to be a spreadsheet showing sales of  
 15 products to Sterling Merchandising in 2004 and 2005, by  
 16 product.  
 17 Q. And the far right-hand column shows sales  
 18 increase over prior year; is that correct?  
 19 A. That's correct.  
 20 Q. And it provides the information both in dollars  
 21 and units; is that correct?  
 22 A. That's correct.  
 23 Q. Directing your attention to the last page of the  
 24 exhibit --  
 25 A. Um-hm.

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1 Q. -- there appear to be, in the left -- in the  
 2 left-hand column it's entitled "Master Group Name."  
 3 Do you see that?  
 4 A. Yes, I do.  
 5 Q. Those are Dreyer's products that it sells to  
 6 Sterling?  
 7 A. Yes. And they're Dreyer's products, some of  
 8 which it appears they sell to Sterling.  
 9 Q. And under the -- in the first column under  
 10 "Current Pricing Per CU," there's a column for Sterling.  
 11 Do you see that?  
 12 A. Yes, I do.  
 13 Q. And the next column is "Southeast Distributor."  
 14 Do you see that?  
 15 A. Yes.  
 16 Q. What's referenced under the "Southeast  
 17 Distributor" column?  
 18 A. Prices to the distributor whose name is Southeast  
 19 Distributor.  
 20 Q. Is that an independent distributor?  
 21 A. Yes.  
 22 Q. Not a -- the first exhibit we looked at some time  
 23 ago had company distribution channels.  
 24 A. Correct.  
 25 Q. But the Southeast Distributor, that's a

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1 counterpart -- is a comparable position to Sterling?  
 2 A. It's an independent distributor.  
 3 Q. Okay. And is -- under the right-hand column  
 4 where it says "Allowances Per Unit" --  
 5 A. Yes.  
 6 Q. -- do you know what's shown there?  
 7 A. Well, the dollar figures.  
 8 Q. And --  
 9 A. It appears to be promotional allowance per unit.  
 10 Q. Did Sterling and the Southeast Distributor  
 11 receive the same allowance per unit?  
 12 A. I don't know that.  
 13 Q. Do you know what accounts for the difference in  
 14 price between -- let's just take the first item on the  
 15 list. Sterling has 2.36 and Southeast Distributor has  
 16 2.64.  
 17 A. Sterling pays its own freight.  
 18 Q. The Southeast Distributor does not?  
 19 A. Probably doesn't.  
 20 (Deposition Exhibit 27 was marked for  
 21 identification.)  
 22 MR. GILLES: Q. Showing you what's been marked  
 23 as Exhibit 27, would you please identify that.  
 24 A. This is an e-mail chain, headed by an e-mail from  
 25 Robert Nealis to John Williams with copies to Stanley

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1 Pasarell and Lee Partin. The date is March 28, 2006, and  
 2 the subject is SlowChurned.  
 3 Q. And the exhibit has Dreyer's 908 and 909; is that  
 4 correct?  
 5 A. Yes.  
 6 Q. Directing your attention to the e-mail that's on  
 7 the lower part of the page from Mr. Williams to  
 8 Mr. Partin, dated March 23, 2006, with copies to  
 9 Mr. Nealis and Mr. Pasarell, I note in the first -- in the  
 10 first sentence, Mr. Williams states that he's "looking  
 11 forward to taking Edy's to its rightful market share  
 12 (50 percent plus or minus)."  
 13 Do you have a sense of what Edy's -- what would  
 14 be -- a rightful market share would be in Puerto Rico?  
 15 MR. ZARLENGA: Object to the form of the question  
 16 as beyond the scope of the deposition notice and calling  
 17 for speculation.  
 18 THE WITNESS: I don't know what the term  
 19 "rightful market share" means.  
 20 MR. GILLES: Q. Well, do you know whether  
 21 Mr. Partin and Mr. Williams discussed a goal, a  
 22 market-share goal for Edy's ice cream in Puerto Rico?  
 23 A. I have no direct knowledge of that, no.  
 24 Q. In the second sentence, he talks -- Mr. Williams  
 25 states, "Our biggest opportunity to gain distribution" --

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1 "is to gain distribution where Nestle is presently paying  
2 to keep us out."

3 Do you see that?

4 A. Yes, I do.

5 Q. And do you have any information about the extent  
6 of the market that's foreclosed from Sterling?

7 MR. ZARLENGA: Object to the form of the  
8 question, utterly lacking in foundation, calls for  
9 speculation, beyond the scope of the deposition notice.

10 THE WITNESS: I don't know what he's referring  
11 to.

12 (Deposition Exhibit 28 was marked for  
13 identification.)

14 MR. GILLES: Q. Showing you what's been marked  
15 as Exhibit 28, which consists of Dreyer's 1608 through  
16 Dreyer's 1610, would you please identify it.

17 A. Yes. This is an e-mail chain headed by an e-mail  
18 from Paul Giomi to Sally Graham, dated September 5, 2006,  
19 subject PR.

20 Q. Who is it Sally Graham?

21 A. Sally Graham worked for Dreyer's in the  
22 international sales division and she's located in Florida.

23 Q. Would you please review the e-mails that are in  
24 the exhibit.

25 A. Okay.

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1 Q. In September 2006, did Dreyer's distribute --  
2 manufacture and distribute Starbucks ice cream?

3 A. Yes.

4 Q. And was Sterling authorized to purchase Starbucks  
5 ice cream during that time period?

6 A. Not specifically.

7 Q. Why was that?

8 A. Because there's a question of whether or not  
9 Dreyer's could sell Starbucks into that market  
10 irrespective of who their distributor was.

11 Q. What was the basis for the question?

12 A. The agreement between Dreyer's and Starbucks for  
13 the joint venture that actually owns the Starbucks ice  
14 cream business.

15 Q. The agreement between Starbucks and Dreyer's  
16 limited Dreyer's authority to distribute the brand --

17 A. Yes.

18 Q. -- to certain geographic areas?

19 A. Correct.

20 Q. And you're uncertain as to whether or not it  
21 permitted Dreyer's to distribute it to Puerto Rico?

22 A. That was the question at issue.

23 Q. Do you know if that was resolved?

24 A. I don't recall.

25 Q. Does Dreyer's still distribute Starbucks?

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1 A. Yes.

2 (Deposition Exhibit 29 was marked for  
3 identification.)

4 MR. GILLES: Q. Showing you what's been marked  
5 as Exhibit 29, would you please -- which consists of  
6 Dreyer's 757 through 758, would you please identify that.

7 A. Yes. It's an e-mail chain from Paul Giomi to  
8 Shawn Bovee, and the date is October 6, 2006. There are  
9 copies to Frank Higgins, Daniel Aellen, A-E-L-L-E-N, both  
10 of whom are in the Glendale foreign trade office of  
11 Nestle, as is Mr. Bovee. Also to Daniel Kolhoff,  
12 K-O-L-H-O-F-F, also in the Glendale foreign trade, and to  
13 Sally Graham. The subject is "Ice cream exports."

14 Q. And directing your attention to the lower part of  
15 the page, that is an e-mail from Shawn Bovee to Paul  
16 Giomi, dated October 6, 2006; is that correct?

17 A. That's correct.

18 Q. And at the time of the e-mail in 2006, was  
19 Dreyer's handling -- to what extent was Dreyer's handling  
20 export of Nestle product?

21 A. I don't understand your question.

22 Q. Well, I'll approach it this way.

23 Directing your attention to the e-mail, on the  
24 lower part of the page, the second sentence states, "As  
25 mentioned, the ice cream export business managed by

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1 Foreign Trade has become increasingly difficult since we  
2 went live with different segments of GLOBE over the past  
3 several months."

4 Do you see that?

5 A. Um-hm.

6 Q. And there is -- then the e-mail sets forth  
7 additional information concerning the customer base of --  
8 is that of the foreign -- that's being managed by foreign  
9 trade?

10 A. At that time.

11 Q. At some point in time, did -- was this  
12 responsibility for this assumed by Dreyer's?

13 A. Portions of it, yes.

14 Q. What portions?

15 A. I know specifically that Puerto Rico was assumed  
16 by Dreyer's.

17 Q. And when did that take place?

18 A. Well, subsequent to this October date,  
19 October 2006 date when the foreign trade office was going  
20 live with GLOBE.

21 Q. So what is the current responsibility that  
22 Dreyer's has with respect to Puerto Rico and the foreign  
23 trade office of Nestle? Is there any duplication between  
24 the two?

25 A. Dreyer's sells Nestle products that it



<p style="text-align: right;">Page 86</p> <p>1 manufactures -- Nestle products manufactured by Dreyer's  2 to Payco, and Dreyer's sells certain Dreyer's products  3 that are manufactured by Dreyer's to Sterling.  4 Q. And if Nestle manufactures products someplace  5 else and sells those to Payco, that isn't managed by  6 Dreyer's?  7 A. Well, that would be correct. But that -- there  8 are no products manufactured elsewhere that are sold into  9 Payco in ice cream distribution.  10 (Deposition Exhibit 30 was marked for  11 identification.)  12 MR. GILLES: Q. Showing you what's been marked  13 as Exhibit 30, Mr. Collette, which consists of Dreyer's  14 930 through 932, would you please identify that.  15 A. An e-mail chain, the last of which is an e-mail  16 from Paul Giomi to Daniel Kolhoff, K-O-L-H-O-F-F, Glendale  17 emerging markets division, dated December 21, 2006,  18 subject, "Turtle Mountain information to Payco Foods."  19 Q. Would you please review the exhibit.  20 What is Turtle Mountain?  21 A. It's an ice cream product.  22 Q. Who is it manufactured by?  23 A. I'm not specifically sure.  24 Q. Is it manufactured by Dreyer's?  25 A. No, it is not manufactured by Dreyer's.</p>	<p style="text-align: right;">Page 88</p> <p>1 Q. Do you know whether as of December 2006 Dreyer's  2 was selling, distributing Turtle Mountain to Sterling?  3 A. No.  4 MR. ZARLENGA: I'll object to the scope. I'm  5 going to object to the question as beyond the scope of the  6 deposition notice.  7 You can answer the question, sir.  8 THE WITNESS: I'm not aware.  9 (Deposition Exhibit 31 was marked for  10 identification.)  11 MR. GILLES: Q. Showing you what's been marked  12 as Exhibit 31, which has Dreyer's No. 977, would you  13 identify that, please.  14 A. This is an e-mail from Paul Giomi to Jill  15 Shoemaker with a copy to Buttons Coleman --  16 Q. Who is Jill Shoemaker?  17 A. Jill Shoemaker works for the ice cream SBU group  18 in an entity of Nestle located in Vevey.  19 Q. What does SBU mean?  20 A. Excuse me. Strategic business unit.  21 -- dated June 5, 2007.  22 Q. And who is Buttons Coleman?  23 A. Buttons Coleman is a vice president of  24 manufacturing who works for Dreyer's Grand Ice Cream.  25 Q. Would you please review the e-mail.</p>
<p style="text-align: right;">Page 87</p> <p>1 Q. Does Dreyer's distribute the product?  2 A. Yes.  3 Q. Where does Dreyer's distribute the product?  4 A. Very limited. I'm not sure which markets.  5 Q. I note on the second page of the exhibit,  6 Dreyer's 931, in the e-mail from Paul Giomi, December 21,  7 2006, to a number of people, principally Alejandra  8 Pacheco, the e-mail states, "Alejandra, we cannot sell  9 this product to Payco at this time. Thank you, Paul."  10 Do you see that?  11 A. Yes, I do.  12 Q. Do you have an understanding why Dreyer's cannot  13 sell the product to Payco at that time?  14 A. No. The later e-mail infers that they were  15 selling it to Sterling.  16 Q. Well, in directing your attention, then, to an  17 e-mail on the first page of the exhibit, Dreyer's 930,  18 specifically the one about two-thirds down the page, from  19 Paul Giomi, dated December 21, 2006, to Daniel Kolhoff,  20 subject "Turtle Mountain information to Payco Foods," he  21 says, "We distribute in the U.S. If we were to begin  22 selling in Puerto Rico, it would have to go through  23 Sterling Merchandising. Paul."  24 Do you see that?  25 A. Yes.</p>	<p style="text-align: right;">Page 89</p> <p>1 A. Um-hm.  2 Q. The e-mail concerns pricing updates for Puerto  3 Rico in the Caribbean?  4 A. Um-hm.  5 Q. And it's an e-mail -- at the time of the e-mail,  6 Mr. Giomi was head of international sales for Dreyer's?  7 A. No, not head of international sales. He worked  8 in the international sales group for Mr. Coleman.  9 Q. Did pricing updates and changes with respect to  10 Puerto Rico and the Caribbean have to be reviewed by  11 Nestle in Vevey?  12 MR. ZARLENGA: I'm going to object to that  13 question as overbroad.  14 THE WITNESS: The -- this deals with two separate  15 subjects. One is general pricing in Puerto Rico. More  16 specifically, this deals with the sale of pint ice cream  17 in the Caribbean, which is different. The pricing would  18 be reviewed at this time -- this is when Dreyer's is  19 owned -- no longer owned 66 percent by Nestle. This is  20 when Dreyer's is owned 100 percent, and so the pricing is  21 a -- is a discussion that they would have, sure, no matter  22 who the distributor is.  23 (Deposition Exhibit 32 was marked for  24 identification.)  25 MR. GILLES: Q. Showing you what's been marked</p>

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1 as Exhibit 32, sir, which has Dreyer's No. 698. Would you  
2 identify that.

3 A. E-mail from Paul Giomi to Ronda Maples, copies to  
4 Sally Graham, Sharon Reece, Terri George, dated Monday,  
5 June 11, 2007, subject, "Pricing Payco foods."

6 Q. Who is Ronda Maples?

7 A. Ronda Maples is an employee of Dreyer's Grand Ice  
8 Cream.

9 Q. What is her position?

10 A. She works in the controllers group in Oakland.

11 Q. Sharon Reece. Who is she?

12 A. Reece, I believe, works in the controllers group  
13 as well.

14 Q. And Terri George?

15 A. Same.

16 Q. Then directing your attention to the lower  
17 e-mail, which is from Paul Giomi to Terri George, subject,  
18 "Pricing Payco foods," would you please review that.

19 A. Yes.

20 Q. Then the first sentence, Mr. Giomi states, "I  
21 need to roll back" -- "I need to roll back to previous  
22 pricing for Payco Foods in Puerto Rico."

23 Do you see that?

24 A. Yes, I do.

25 Q. Do you have an understanding of why pricing had

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1 to be rolled back for Payco at -- in June of 2007?

2 A. Oh, yes, I do.

3 Q. Would you explain that, please?

4 A. Because the way that pricing changes are made in  
5 the markets within Nestle is on an annual basis, and so  
6 the way that pricing is implemented is on an annual basis.  
7 This is the mid-year, so this is the correction of a  
8 pricing change that was entered improperly. It's  
9 administrative.

10 Q. So sometime before June 11, 2007, a pricing  
11 change had been implemented by Dreyer's for Payco; is that  
12 right?

13 A. For products sold to Payco. And that pricing  
14 change subsequently implemented when -- in the appropriate  
15 cycle.

16 Q. Do you know how far -- when in time before  
17 June 11, 2007, the price change was implemented?

18 A. I'm not aware of that specifically, no.

19 (Deposition Exhibit 33 was marked for  
20 identification.)

21 MR. GILLES: Q. Showing you what's been marked  
22 as Exhibit 33, would you -- which bears Dreyer's No. 836  
23 through 839, would you identify that, please.

24 A. This is an e-mail from Paul Giomi to Terri  
25 George, Ronda Maples, copies Sally Graham and Sharon

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1 Reece, dated July 11, 2007, subject, "Pricing Payco  
2 foods."

3 Q. And who is Terri George?

4 A. Again, I believe she work in the controllers  
5 group.

6 Q. And this again relates to the matter that we  
7 discussed with respect to Exhibit 32 on rolling back the  
8 price for Payco?

9 A. Yes. It is administrative.

10 Q. That's the same -- it's the same situation?

11 A. Yes.

12 Q. I note in the third sentence in the initial, the  
13 e-mail that appears on the top of the page, the one from  
14 Mr. Giomi to Terri George and others, it says, "I know  
15 Ronda updated the pricing which actually rolled back the  
16 pricing due to a request from Vevey. However, the higher  
17 pricing is showing up when we invoice them."

18 Do you see that?

19 A. Yes.

20 Q. Does that mean the attempt to correct it wasn't  
21 successful initially and so the invoicing continued at the  
22 previous price?

23 A. That's what it would appear, yes.

24 Q. Now, at this point in time, Dreyer's was dealing  
25 directly with Payco, correct?

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1 A. Correct.

2 Q. Yet the e-mail refers to a request from Vevey.  
3 Do you see that?

4 A. Um-hm.

5 Q. Do you have a -- why would the request come from  
6 Vevey as -- why would the request come from Vevey?

7 A. Because the ice cream SBU, strategic business  
8 unit, is located in Vevey.

9 Q. So since this was a -- I understood this to be an  
10 administrative error with respect to increasing the price  
11 for Payco.

12 A. Right.

13 Q. Why wasn't that just something that was addressed  
14 between Payco and Dreyer's directly?

15 A. Because Payco is like Dreyer's, an entity owned  
16 by Nestle, and so the ice cream SBU has awareness of those  
17 two entities in those markets different than Sterling.  
18 Sterling is an entity that distributes products for  
19 Dreyer's. Sterling doesn't have an association with the  
20 ice cream SBU. Sterling has an association with Dreyer's,  
21 so those two things would happen differently.

22 (Deposition Exhibit 34 was marked for  
23 identification.)

24 MR. GILLES: Q. Showing you what's been marked  
25 as Exhibit 34, Mr. Collette, which consists of Dreyer's

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1 317 and 318, and I would ask if you would identify that,  
2 please.

3 A. The page is titled "Payco Pricing Worksheet." It  
4 appears to be a series of columns with products and sales  
5 history for 2006 and '7 in dollars and units.

6 Q. Do you know whether this is a complete listing of  
7 sales by dollars and units for Payco for the time periods  
8 reflected?

9 A. I do not know that.

10 Q. Do you know who caused this document to be  
11 printed or prepared?

12 A. No, I do not.

13 Q. Under the column on the right-hand side where it  
14 says "2006 price brand calculation," do you see that?

15 A. Yes, I do.

16 Q. What is depicted there?

17 A. It's the unit price of the item.

18 Q. In dollars?

19 A. Yes.

20 Q. And that's the price that Payco would pay for the  
21 item?

22 A. I'm not sure about that.

23 Q. Why aren't you sure?

24 A. Because I'm just simply doing the math here. The  
25 price in the column you're referring to times the units

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1 equals the sales dollars in 2006, but I don't know if  
2 that's Payco's sales to the trade or whether that's the  
3 selling price of the products to Payco. There's nothing  
4 that tells me that here.

5 Q. Okay.

6 MR. GILLES: I note it's 20 after 12:00.

7 MR. ZARLENGA: Want to break for lunch?  
8 (Lunch recess.)

9 MR. GILLES: Q. Mr. Collette, I'd like to show  
10 you an exhibit that we marked earlier, Exhibit 18 --

11 A. Um-hm.

12 Q. -- and direct your attention to the bottom part  
13 of the exhibit. Specifically, I think, under 2002 there  
14 is reference to an increase in the size of the container.

15 Do you see that?

16 A. Um-hm.

17 Q. Sir, you have to answer "yes."

18 A. Oh, I'm sorry. Yes.

19 Q. Thank you.

20 A. Got to get restarted.

21 Q. In terms of Dreyer's determination to convert the  
22 half-gallon to a 56-ounce size, was that the subject of  
23 some discussion within Dreyer's?

24 A. Yes. It's actually a decrease in size, not an  
25 increase in size.

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1 Q. Oh, I misspoke. It's a decrease.

2 What -- was there a specific procedure that was  
3 used to make the determination to decrease the size of the  
4 half-gallon?

5 A. What do you mean by "a specific procedure"?

6 Q. Well, how did Dreyer's go about making that  
7 decision?

8 A. That's consumer market driven. That's a very  
9 large process.

10 Q. Could you explain it to me, please?

11 MR. ZARLENGA: I'm going to just object to the  
12 question about changing the size of the package all across  
13 the world as beyond of scope of the deposition notice.

14 THE WITNESS: The process was one that primarily  
15 focused on consumer acceptance of a product in a  
16 smaller-size container.

17 MR. GILLES: Q. What sort of market studies were  
18 done to become informed of potential consumer reaction to  
19 the change in container size?

20 MR. ZARLENGA: Same objection.

21 THE WITNESS: I don't have specific knowledge of  
22 what exactly those studies were.

23 MR. GILLES: Q. How long a -- how long did the  
24 process take to reach a determination to decrease the  
25 container size?

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1 A. I don't know specifically how long it took.

2 Q. More than a year?

3 A. No, it did not take more than a year.

4 Q. Was there test marketing done to gauge consumer  
5 acceptance?

6 A. Yes. I believe there was.

7 Q. What type of test marketing was performed?

8 A. I recall that we produced packages and sold them  
9 in a market, a test market.

10 Q. And what observations did you make as a result of  
11 the test marketing?

12 A. Well, when you say "what observations," can you  
13 be more specific?

14 Q. What conclusions did you reach as a result of the  
15 test market about consumers' acceptance of a decrease in  
16 package size?

17 A. The company broadly reached a conclusion that  
18 they could change the package size successfully.

19 Q. How did the company announce the change in  
20 package size to its distributors?

21 A. They notified them that the packaging would  
22 change at a certain point.

23 Q. And at the point in time that Dreyer's decreased  
24 the package size, had its competitors decreased their --  
25 the package size of comparable products?

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1 A. I recall, yes, some of them had.  
 2 Q. So Dreyer's wasn't the first to decrease the  
 3 half-gallon size to 56 ounces?  
 4 A. No, I don't recall they were.  
 5 Q. Within Dreyer's organization at that time, who  
 6 made the final decision regarding the decrease in package  
 7 size?  
 8 A. I don't know who made the final decision.  
 9 Q. Who would have been involved in making that  
 10 decision?  
 11 A. Many, many people. I can't answer that question  
 12 specifically. Many people.  
 13 Q. I want to direct your attention to the next page  
 14 of the exhibit --  
 15 A. Um-hm.  
 16 Q. -- and specifically under the heading "2004," a  
 17 reference to the "June 28, Edy's is forced to reduce  
 18 support to \$0.65 per unit due to raw material cost  
 19 increase."  
 20 Do you see that?  
 21 A. Yes, I do.  
 22 Q. What type of process was used to make the  
 23 determination to make that -- to reduce support to \$0.65?  
 24 A. An analysis of the effect of increasing our raw  
 25 material prices, primarily dairy products, during that

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1 time.  
 2 Q. Were you involved in that decision?  
 3 A. Not involved in the decision directly. No, I was  
 4 not.  
 5 Q. At the time, were you aware of -- that a  
 6 consideration was being undertaken to reduce the support  
 7 price?  
 8 A. Yes, I was. Let me be very specific. You asked  
 9 me if I was aware that there was a consideration to reduce  
 10 the support price.  
 11 No, not specifically the support-price issue that  
 12 you're referring to here.  
 13 Q. Were you aware of the consequences of raw  
 14 material cost increases and what the company was going --  
 15 what actions the company was going to take in response to  
 16 that?  
 17 A. Broadly, yes.  
 18 Q. In terms of the reduction in the price support,  
 19 who would be involved in making that decision?  
 20 A. The people who were directly involved in the  
 21 distribution relationship.  
 22 Q. So that would be Mr. Nealis?  
 23 A. Mr. Nealis, Mr. Birchbauer, Mr. Frick.  
 24 Q. And do you know whether price -- the reduction in  
 25 support for -- strike that. Let me start again.

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1 Do you know whether there was a reduction in the  
 2 support price that was being paid to other independent  
 3 distributors made at that same time?  
 4 A. There were price increases that were invoked at  
 5 that time broadly on all products to all distributors. So  
 6 broadly, across Dreyer's products, Edy's products, Nestle  
 7 products to independent distributors.  
 8 Q. This is in 2004?  
 9 A. Correct.  
 10 Q. So for Sterling, the effect was a reduction in  
 11 the allowance of \$0.65 per unit?  
 12 A. Correct.  
 13 Q. But I'm understanding you to say that for other  
 14 distributors at that time there was a different approach  
 15 taken.  
 16 A. For Payco there was an increase in the cost of  
 17 certain products.  
 18 Q. How was the determination made to reduce  
 19 Sterling's support price by \$0.10? I mean, how did you  
 20 arrive at that particular number?  
 21 A. Well, broadly, that was a determination made by  
 22 those who were directly responsible in consideration of  
 23 all of the factors around the market price of the product  
 24 and the effect -- potential effect on sales in the market.  
 25 Q. Now, was -- in terms of responding to the raw

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1 material cost increases, was a particular person within  
 2 the Dreyer's organization in 2004 assigned to undertake a  
 3 study of that question and develop recommendations with  
 4 respect to how to address it?  
 5 A. No, not a particular person.  
 6 Q. Was it a group of people?  
 7 A. Broadly, there would be a lot of people involved  
 8 in that kind of a discussion.  
 9 Q. I mean, there would have been any number of  
 10 different alternatives that Dreyer's could have taken with  
 11 respect to the increase in raw material costs beyond just  
 12 decreasing the price supports, right?  
 13 A. I'm sorry. Restate that for me?  
 14 Q. There were other alternatives to -- available  
 15 beyond a reduction in the price support to Sterling to  
 16 deal with increasing raw material costs, right?  
 17 A. Yes. Could have increased the list price.  
 18 Q. And -- well, were not various alternatives  
 19 considered by Dreyer's at that time before selecting the  
 20 reduction in the allowance?  
 21 A. Were they not considered for -- specifically for  
 22 what?  
 23 Q. Well, instead of -- did you consider something  
 24 beyond reducing the allowance per unit item as a way to  
 25 recover the increased cost of raw materials?



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1 A. I don't know if there were specific  
2 considerations or alternatives for Sterling considered. I  
3 don't have knowledge of that.

4 Q. Now, in 2004 would have this determination been  
5 made -- would have someone at Vevey in Switzerland had  
6 input into this determination?

7 A. No.

8 Q. You recall one of the first exhibits we looked at  
9 referred to an e-mail from Thomas Ward in 2003?

10 A. You're going to have to refresh my memory here.

11 Q. I will.

12 A. We've seen a few documents from him.

13 Q. I'm showing you what's marked as Exhibit 5. The  
14 first sentence refers to an e-mail from Mr. Ward to  
15 Mr. Sadurni.

16 A. Sadurni, um-hm, yes, it does.

17 Q. On various -- strike that.

18 Is it possible that Mr. Ward's e-mail regarding  
19 his observations about the distribution in Puerto Rico was  
20 a factor in increasing the price to Sterling in 2004?

21 A. I'm not sure what Mr. Ward was thinking about. I  
22 can't speculate on what Mr. Ward was thinking about.

23 Q. So you wouldn't have any information that  
24 communications from Mr. Ward or someone else might have  
25 affected Dreyer's decision to increase or to decrease the

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1 allowance to Sterling in 2004?

2 A. No, I would not have any information that that  
3 would be the case.

4 Q. Does, or has Dreyer's -- strike that.

5 Has Dreyer's undertaken market studies to  
6 identify brand loyalty of its customers?

7 A. Yes, broadly.

8 Q. And what -- what has it done to investigate that?

9 A. Conducted market studies that are designed to  
10 determine brand loyalty for certain brands, certain  
11 markets.

12 Q. When -- how often has Dreyer's undertaken that  
13 effort, such an effort?

14 A. Periodically.

15 Q. Within the last five years?

16 A. I don't have specific knowledge of when. But  
17 yes, I'm sure they have.

18 Q. Can you describe to me how a particular study is  
19 structured to investigate that matter?

20 A. Not specifically as to methodology, no.

21 Q. Well, generally?

22 A. Generally. Generally, a brand loyalty study  
23 determines what percentage of an individual's or  
24 household's total consumption of a particular product is  
25 consumed -- or, excuse me, is to one particular brand.

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1 Q. Is that done via a customer survey?

2 A. Not -- well, not specifically. Typically it's  
3 done on a commission basis from some firm that studies  
4 that kind of behavior.

5 Q. So Dreyer's would engage a consulting firm or a  
6 marketing firm, some independent firm to conduct such a  
7 study?

8 A. To collect the data for such a study, yes.

9 Q. Has Dreyer's used any particular firms  
10 consistently during the last five years?

11 A. I don't have that knowledge. I'm not aware of  
12 that.

13 Q. Who would know that?

14 A. I don't -- I can't tell you who specifically  
15 would know that at Dreyer's, but --

16 Q. Who would you call to find out who would know  
17 that?

18 A. I would call someone at Dreyer's.

19 Q. Who?

20 A. In the marketing group.

21 Q. And who? Who would that be?

22 A. I think it would probably depend on the brand  
23 that I was interested in.

24 Q. Say Edy's.

25 A. I would call the Edy's brand manager to ask them.

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1 Q. And who is that?

2 A. At this point in time, I'm not aware of who the  
3 Edy's brand manager is.

4 Q. There is an individual whose job title is Edy's  
5 brand manager?

6 A. Not specifically. There would be an individual  
7 whose job title is something around packaged ice cream  
8 brand or something of that nature.

9 Q. So his or her title would be what?

10 A. Something like that, manager of packaged ice  
11 cream brand, something of that nature. I'm not actually  
12 sure.

13 Q. Have you seen reports that have analyzed -- that  
14 have resulted from this type of study?

15 A. Have I -- oh, yes, sure.

16 Q. Would you describe them to me?

17 A. I have seen reports periodically over the last  
18 20 years, so I need a little more specific direction.

19 Q. Describe one in the last five years that  
20 attempted to analyze customer brand loyalty to Edy's.

21 A. That -- that study would simply state as a  
22 percentage what percentage of total typically household  
23 requirement for ice cream was allocated to Edy's.

24 Q. Would it be a multipage document?

25 A. I would have only seen summaries of that. I'm

27 (Pages 102 to 105)

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1 sure that there was something, but I would see summaries.  
2 I've seen summaries.

3 Q. Does Dreyer's keep the studies that it's done  
4 over time so it can understand how people's behavior may  
5 be changing?

6 A. I'd have to speculate. I'm not sure exactly what  
7 the retention policy is around those kind of documents.

8 Q. Do you know what the retention policy is of  
9 documents obtained from ACNielsen or IRI?

10 A. No, I don't, not specifically.

11 Q. I'd like to direct your attention to the impulse  
12 market or novelty market.

13 A. Okay.

14 Q. Has Dreyer's -- what do you understand by "the  
15 impulse market"?

16 A. Are you asking me broadly what is --

17 Q. Yeah. Um-hm.

18 A. -- an impulse product?

19 Q. Yes.

20 A. It's a product that is typically a novelty  
21 product that is purchased in other than a grocery store.

22 Q. Usually available, say, at a checkout in a  
23 freezer where someone can select a single item to consume  
24 at that point in time?

25 A. Could be.

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1 Q. Could be? Could be.

2 Does -- for Sterling, does Dreyer's provide any  
3 direct support of impulse product marketing?

4 A. You have to be a little more specific. I don't  
5 know what you mean by "direct support of impulse  
6 marketing."

7 Q. Does it provide payments for or freezers for  
8 displaying impulse products?

9 A. I'm not sure of the impulse marketing program  
10 with Sterling. I'm not aware of it at that level of  
11 detail.

12 Q. What about with respect to other distributors?

13 A. Other distributors?

14 Q. Other than Sterling.

15 A. Oh, I'm not aware of the specific way that that's  
16 conducted at the distributor level.

17 Q. Does Dreyer's have or has Dreyer's done marketing  
18 studies with respect to the sale of novelty items in the  
19 impulse market?

20 A. Broadly?

21 Q. Yes.

22 A. Yes.

23 Q. And what's been the focus of the studies?

24 A. You have to be a little more specific. When you  
25 say "focus," what do you mean?

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1 Q. What do the studies try and investigate?

2 A. Well, the studies could investigate either  
3 products or venues or occasions, one of those things.

4 Q. Has Dreyer's identified the type of locations  
5 that are best suited for this sort of sales effort?

6 A. Dreyer's would have identified a range of  
7 locations, not a best location.

8 Q. And in terms of the type of product that are  
9 offered at those locations, what sort of studies has  
10 Dreyer's undertaken to make that determination?

11 A. Product development studies.

12 Q. What's involved in the --

13 A. Process. I shouldn't even call it a study. It's  
14 a process.

15 Q. What's involved in the product development  
16 process?

17 A. Product development process would match up  
18 product forms to the occasion in such a way that you have  
19 the highest probability of a product that's going to be in  
20 demand at one or more locations.

21 Q. Are -- is that type of study ongoing at Dreyer's?

22 A. Product development is an ongoing process in  
23 consumer products broadly.

24 Q. And continues to be -- I mean, Dreyer's continues  
25 with that effort?

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1 A. Yes.

2 Q. With respect to -- going back to grocery store  
3 and take-home products, 56-ounce products or pints, are  
4 you familiar with slotting, the payment of slotting fees  
5 to retailers?

6 A. Yes.

7 Q. Does -- how does that -- what do you understand  
8 by that?

9 A. Slotting is an initial fee charged by a retailer  
10 to authorize the delivery and placement of a product on  
11 its shelf and to authorize that product -- certain SKUs of  
12 that product to be sold and scanned in the retailer  
13 system.

14 Q. Is it -- does Dreyer's reimburse -- has Dreyer's  
15 reimbursed Sterling for the payment of slotting fees?

16 A. I'm not aware specifically of the arrangement  
17 with Sterling with regard to slotting fees.

18 Q. Has Dreyer's reimbursed Payco with respect to the  
19 payment of slotting fees?

20 A. I'm not aware of that specific level with Payco,  
21 either.

22 Q. Are there any other payments other than slotting  
23 fees that are paid to retailers by Dreyer's for placement  
24 of its product?

25 A. I'm not aware of other payment.

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1 Q. Pay-to-stay fees? Does that -- do you have an  
2 understanding of that term?  
3 A. That's a jargon. Yeah, that's jargon.  
4 Q. It's not something specific that you're aware of  
5 that Dreyer's would reimburse distributors for?  
6 A. I'm not specifically aware. Depends -- again,  
7 I'm not aware of that with respect to Sterling.  
8 Q. Going back to exhibit, I believe it's 18 --  
9 A. This one?  
10 Q. Yes.  
11 -- on the second page, under 2005, it says that  
12 Edy's will support Sterling at \$0.60 per unit, correct?  
13 A. Yes.  
14 Q. And then there's a note plus and three bullet  
15 points: 10,000 light demo support, 5,000 Dibs demo  
16 support, 5,000 other demo support.  
17 Can you explain that to me?  
18 A. Those were additional fees -- not fees, that's  
19 the wrong word. Additional funds provided to Sterling for  
20 the support of each of those respective products and the  
21 marketing of each of those respective products at the  
22 consumer level.  
23 Q. And that's \$10,000 in total for the calendar year  
24 2005?  
25 A. I'm not -- I'm not sure exactly that that's how

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1 this is structured. It just appears under the caption  
2 that way.  
3 Q. Do you know if -- what the Edy's support was for  
4 Sterling in 2006 in terms of the allowance?  
5 A. No, I'm not aware of that.  
6 Q. Earlier this morning I asked you about a meeting  
7 in February 2004 or March 2004 between executives from  
8 Dreyer's and Nestle, and I think I mentioned Mr. Silva.  
9 In addition to Mr. Silva or beyond that, are you  
10 aware of any meeting with a Mr. Represas between Dreyer's  
11 executives and Mr. Represas regarding the Puerto Rican  
12 market in February or March of 2004?  
13 A. No.  
14 Q. Did you inquire about whether or not any such  
15 meetings took place during that time period?  
16 A. The reference to that meeting was in a Payco  
17 document and was referring to people outside of Dreyer's,  
18 so I had no -- no one to whom I could inquire about that  
19 meeting at Dreyer's.  
20 Q. Does Dreyer's -- and earlier we looked at the --  
21 directing your attention to Exhibit 10, and specifically a  
22 page from the PowerPoint that's Dreyer's 2371 that has the  
23 heading "Puerto Rico," and I directed your attention  
24 earlier to confusing brand alliances between primary --  
25 does it say between distributors?

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1 Does Dreyer's have any plans currently to deal  
2 with that problem in the future?  
3 MR. ZARLENGA: Object to the form of the  
4 question, to the extent it lacks proper foundation.  
5 MR. GILLES: I'll withdraw the question and  
6 reframe it.  
7 Q. That was a topic of discussion at a meeting that  
8 occurred in 2004, correct?  
9 A. I'm not aware of the meeting you're referring to.  
10 Q. Well, the document itself is attached to a series  
11 of e-mail that refer to a meeting that was to occur in  
12 Puerto Rico in -- I believe it's September of 2004.  
13 A. No.  
14 Q. What --  
15 A. The document refers to -- the document is a  
16 document dated September 8, 2003.  
17 Q. I'm sorry. Thank you. 2003.  
18 And it refers to a meeting in Puerto Rico -- a  
19 meeting that's scheduled in Puerto Rico?  
20 A. Scheduled, yeah.  
21 Q. In September of 2003?  
22 A. Um-hm.  
23 Q. Correct?  
24 A. Yes, I believe that's what the first page refers  
25 to.

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1 Q. And on the page that's in front of you, 2371,  
2 Dreyer's 2371, one of the bullet points is "confusing  
3 brand alliances between primary distributors," correct?  
4 A. Yes.  
5 Q. And you don't -- as we sit here today, you don't  
6 know whether that was discussed -- whether or not a  
7 meeting even took place in Puerto Rico in September  
8 of 2003?  
9 A. That's correct.  
10 Q. Did you attempt to seek out someone within  
11 Dreyer's who might have knowledge of that meeting in order  
12 to prepare for today's deposition?  
13 A. The people who would beware of that meeting are  
14 no longer at Dreyer's.  
15 Q. But this morning we talked about the -- this  
16 topic as dealing with the situation in Puerto Rico where  
17 Sterling distributes Edy's and Ben & Jerry's.  
18 A. Right.  
19 Q. And Edy's is manufactured by Dreyer's and  
20 Ben & Jerry's is manufactured by Unilever, correct?  
21 A. Correct.  
22 Q. Unilever is Nestle's competitor, correct?  
23 A. Correct.  
24 Q. And Payco, Nestle's distributor in Puerto Rico,  
25 distributes Haagen-Dazs and Nestle, correct?

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1 A. No. Haagen-Dazs and Breyers.  
 2 Q. And Breyers. And Breyers is manufactured by  
 3 Unilever, which is Nestle's competitor.  
 4 A. Correct. And Haagen-Dazs in the international  
 5 market is a brand that is controlled by General Mills.  
 6 Q. So my question is whether or not this situation  
 7 where Nestle in effect is distributing a product that it  
 8 doesn't manufacture and in fact is manufactured by a  
 9 competitor, whether you're aware of any plan or business  
 10 strategy to address that issue.  
 11 A. I'm not -- I don't have that information. No,  
 12 I'm not aware of that.  
 13 Q. In reviewing the documents, at least in 2003 --  
 14 A. Right.  
 15 Q. -- there were references to overtures by Nestle  
 16 to Sterling to -- relative to a transaction that would  
 17 result in potentially acquiring Sterling's business  
 18 operations, correct?  
 19 MR. ZARLENGA: I'll object to the form of the  
 20 question as lacking proper foundation.  
 21 THE WITNESS: There are documents in there that  
 22 would suggest that.  
 23 MR. GILLES: Q. And you don't know whether  
 24 any -- what happened with respect to those particular  
 25 discussions?

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1 A. No. That's correct.  
 2 Q. And from a -- just a second.  
 3 I just want to make sure -- I want to direct your  
 4 attention again to Exhibit 10, and this time to 2004 --  
 5 A. Um-hm.  
 6 Q. -- and the \$0.05 price reduction that occurred  
 7 during that time period -- at that time.  
 8 A. That's not what's stated here, but -- I'm sorry.  
 9 Q. That's a \$0.05 price -- \$0.10. The \$0.05 price  
 10 reduction occurred in 2005, right? I'm sorry, I misspoke.  
 11 The first bullet point under 2005 refers to the  
 12 allowance at a level of \$0.60 per unit?  
 13 A. The price support for 2005 was set at \$0.60 per  
 14 unit.  
 15 Q. Right, and that's \$0.05 less than had been set  
 16 the previous year?  
 17 A. Yes, than had been implemented in June of the  
 18 previous year, that's correct.  
 19 Q. So at that time in -- when that went into effect  
 20 in January of 2005 --  
 21 A. Um-hm.  
 22 Q. -- were there corresponding price adjustments for  
 23 other independent distributors?  
 24 A. Yes.  
 25 Q. And how were those implemented?

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1 A. As corresponding price increase. There's a list  
 2 price increase to Payco of approximately 7 percent.  
 3 Q. How is it that Dreyer's -- or what explains the  
 4 determination to change the price support to Sterling and  
 5 raise the price -- list price to Payco?  
 6 A. There had a different historic pricing  
 7 relationship or relationship with Sterling, so their  
 8 historic manner of providing support to Sterling was  
 9 through a promotional price support.  
 10 Q. Okay. And I noticed that earlier today we had  
 11 one document that was an e-mail chain that described  
 12 pricing for Dibs.  
 13 A. Yes.  
 14 Q. Do you recall that?  
 15 A. Yes, generally.  
 16 Q. And have you seen in your preparation for today  
 17 any comparable document that would relate to the  
 18 determination in -- to increase or to decrease the  
 19 allowance in 2004 to \$0.60 per unit?  
 20 A. I'm sorry. I don't understand what you mean by  
 21 that.  
 22 Q. Well, there was a price decrease that went into  
 23 place -- the price -- the allowance decrease that went  
 24 into effect in January 2005 --  
 25 A. Correct.

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1 Q. -- was \$0.05, correct?  
 2 A. Right.  
 3 Q. Have you seen any documents that would set out  
 4 the -- a decision to make that price reduction?  
 5 A. I don't recall specifically a document that sets  
 6 out the price reduction.  
 7 Q. Wouldn't you expect to find some documents within  
 8 Dreyer's organization that would reflect the determination  
 9 to make a reduction in the allowance?  
 10 A. Not specifically as you've stated it, no. I  
 11 wouldn't necessarily expect to find that, no.  
 12 Q. It would all be as a result of personal  
 13 interaction among Dreyer's employees that the decision  
 14 would be made to -- without any written or documentary  
 15 record of the determination to change the allowance?  
 16 A. As a matter of annual process that you earlier  
 17 described, making a plan for the succeeding year, a  
 18 determination of independent distributor prices would have  
 19 been part of that process, and that would not have been in  
 20 the form that you describe it.  
 21 Q. What form would it have taken?  
 22 A. Just simply as a part of the planning process,  
 23 and there would be discussion at the -- with the  
 24 independent distributors around that.  
 25 MR. GILLES: Okay. Mr. Collette, I don't have

1 any more questions, thank you.

2 MR. ZARLENGA: I don't have any questions.

3 THE REPORTER: Would you like a copy of this  
4 transcript?

5 MR. ZARLENGA: Yeah, I suppose, sure.

6  
7 (Proceedings concluded at 2:01 p.m.)

8  
9  
10 -0-

11  
12 I have read the foregoing deposition transcript  
13 and by signing hereafter, approve same.

14  
15 Dated \_\_\_\_\_.

16  
17  
18 \_\_\_\_\_  
19 William Collette

20  
21  
22  
23  
24  
25

# EXHIBIT D



## David Gilles - RE: meet & confer

---

**From:** "Zarlenga, Carmine" <ZarlengaC@howrey.com>  
**To:** David Gilles <Dgilles@gklaw.com>  
**Date:** 5/29/2008 5:12 PM  
**Subject:** RE: meet & confer  
**CC:** "Luis A. Oliver" <loliver@fgrlaw.com>, "Koons, Erik" <KoonsE@howrey.com>, "Seth A. Erbe" <seth.erbe@indianowilliams.com>

---

I should be to your office between 9:30 am and 10 am if my flights are on time.

---

**From:** David Gilles [mailto:Dgilles@gklaw.com]  
**Sent:** Thursday, May 29, 2008 5:35 PM  
**To:** Zarlenga, Carmine  
**Cc:** Luis A. Oliver; Koons, Erik; Seth A. Erbe  
**Subject:** RE: meet & confer

Carmine,

While I disagree with your characterization of the burdensomeness of Document Request No. 6, I appreciate and accept your offer and agree to limit the request accordingly.

I respectfully decline your request to withdraw Document Request No. 5. Plaintiff has made good faith efforts to narrow the scope of this request. I do not believe that seeking responsive documents from 75 employees amounts to a burden that would excuse production of documents. While you may disagree, plaintiff regards the information sought in this request to be significant and relevant.

I believe that reasonable steps can be taken to minimize the burden on 75 marketing employees. I am not familiar with the organization or internal procedures such that I am in a position to offer meaningful suggestions to limit the burden. Nonetheless, should some measures occur to you, I remain willing to discuss same.

Please advise me what time you would like to meet tomorrow.

Dave

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>>> "Zarlenga, Carmine" <ZarlengaC@howrey.com> 5/29/2008 3:32 PM >>>  
Dave:

Following receipt of your last e-mail, we have conferred with our client and provide the following update and offer of compromise:

**Document Request No. 6:** We have confirmed with Dreyer's that there is no central custodian or custodians who maintain(s) market studies and / or reports obtained from Nielsen, IRI, or other such third-party companies. Nor is there a central file or repository where such data is maintained. Rather, virtually all of the approximately 75 marketing employees in Dreyer's Oakland offices have access to online accounts with access to such companies' services. Based on our discussion yesterday, you are under a misapprehension about the nature of Nielsen and IRI data. The Company does not receive "reports" and few employees print or save "reports." Instead, most employees who access this data simply view it on the computer in real time. While it is possible that the rare employee printed and saved a "report" in his or her personal hard-copy or electronic files, determining same would require a search of virtually every paper and electronic document maintained by at least 75 employees. We have also confirmed that these on-line services do not save queries, searches, or reports that might have been run / accessed.

On rare occasions, some employees have saved "reports" on an internal shared computer drive. Although we have confirmed that there are some such "reports" on this shared drive, we are unaware of the volume of this data, and whether it relates to Edy's ice cream take home brands. To search for it will be burdensome as the computer drive contains numerous folders and subfolders. It is NOT something that can easily be done with the push of a button, but will take time. We maintain that the data sought by this Request is not relevant and not likely to lead to the discovery of admissible evidence, and that the Request is overbroad and unduly burdensome. This burden is exacerbated by the fact that the information sought is publicly available and thus, it is far easier for Sterling to obtain the specific data it purportedly needs for its expert reports than it is for Dreyer's to extensively search through at least 75 of its employees' hard-copy and electronic files for generalized market "reports" covering the whole United States in the hope that maybe something will be found.

Nonetheless, in the spirit of compromise, we are offering to produce "[m]arket studies and reports from A.C. Nielsen, New York, NY, Information Resources, Inc. (IRI), Chicago, IL, and other companies regarding the promotion and sale of Edy's ice cream . . . located on Dreyer's shared computer drive for the period January 1, 2003 to December 31, 2006 (date restriction as stated in your email of today). I am reluctant to even offer this compromise because I truly believe this discovery request is far beyond the realm of reasonable discovery in a case where the plaintiff has alleged a relevant geographic market of Puerto Rico only. I do not understand why my client should have to take an expensive and burdensome search when your client can access the Nielsen and IRI information and get access to whatever data that may be there.

**Document Request No. 5:** Sterling's Request No. 5, even if limited the Oakland Marketing division and for the four-year period from January 1, 2003 to December 31, 2006, is extremely overbroad and unduly burdensome based on specific discussions we have had with our client.

Sterling's Request No. 5 would require Dreyer's to search through both the paper **and** electronic files of approximately 75 employees. As for electronic records, each of these 75 employees maintains electronic



records in at least the form of: (i) an email account on the Dreyer's server; (ii) personal or .pst files; (iii) data saved on the employees' individual hard drive; and (iv) data saved in a shared computer drive. Within the shared drive, there are approximately fifty (50) different shared folders. In addition to the foregoing, each of these 75 employees has an individual folder on the Dreyer's server to save electronic data (separate and apart from the shared drive). There is also no standard for labeling documents at Dreyer's. As such, searching for the information sought in Request No. 5 would require Dreyer's to open virtually every electronic file to determine "responsiveness" (including verifying the date of each document and the substantive content). The discussions that we have had regarding the foregoing request have not materially mitigated the extreme burden that the Request would impose on Dreyer's.

Moreover, Sterling has alleged that: (i) the relevant geographic market is limited to "the Commonwealth of Puerto Rico," and possibly "narrower submarkets," and (ii) the alleged requirement to maintain a DSD system in Puerto Rico distinguishes the Puerto Rico market from "most distribution markets." (Amended Complaint paras. 14, 15.) As such, the information sought by this request -- market research reports and analyses for the U.S. mainland -- is not relevant to any allegations in Sterling's Amended Complaint, nor is it likely to lead to the discovery of admissible evidence. (As you know, Dreyer's has already produced documents responsive to Request No. 5 and 6 relating to Puerto Rico.)

As such, in its current form, Dreyer's cannot agree to search for or produce additional documents (beyond those that it has already produced regarding the Puerto Rico market) sought by Request No. 5. I urge you to withdraw that request given the foregoing information. I do not make this request lightly. Dreyer's has been more than reasonable in discovery thus far, incurring great expense. When you sought relevant materials, we produced them. Several witnesses were made available for deposition. But with all due respect, this request is too burdensome especially when its dubious relevancy is taken in to account. Let me know if you will agree as soon as you can. Otherwise, we will have to meet in person tomorrow per the Court Order.

*Carmine R. Zarlenga*

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---

**From:** David Gilles [mailto:Dgilles@gklaw.com]  
**Sent:** Thursday, May 29, 2008 12:18 PM  
**To:** Zarlenga, Carmine  
**Cc:** Luis A. Oliver; Koons, Erik; Seth A. Erbe  
**Subject:** RE: meet & confer

Carmine,

Regarding Doc. Req. # 5, yesterday I understood you to say that you found the language in the request to be unclear and vague (among other concerns). I disagreed, but offered to provide further explanation of what I regarded as responsive to the request. I believe that market reports, studies and analysis (as outlined in my email below) regarding customer behavior - whether undertaken by Dreyer's or obtained from other sources - are responsive to the request.

We will narrow the request to this type of market research; as a consequence the terms "product concept, media plans, market segmentation, ...and other market analysis" can be stricken from the Request.

2. No. Again, my earlier email was an attempt to provide further explanation of what I regard as responsive to the request; it was not intended to expand the scope of the request.

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>>> "Zarlenga, Carmine" <ZarlengaC@howrey.com> 5/29/2008 10:27 AM >>>  
Dave:

I am not clear on your proposal as follows:

1 What about the language in Doc. Req. #5 referring to "syndicated research and other marketing analysis and data purchased from third parties,...market simulation, product concept, media plans, market segmentation, price elasticity, ...and other market analyses..." Are you dropping out those items in favor of what you have set forth below?

2. Also, are you replacing the key qualifier "regarding ice cream products (including Edy's)" with "regarding consumer behavior?"

Please clarify if you can.

*Carmine R. Zarlenga*  
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---

**From:** David Gilles [mailto:Dgilles@gklaw.com]  
**Sent:** Thursday, May 29, 2008 10:48 AM  
**To:** Zarlenga, Carmine  
**Cc:** Luis A. Oliver; Koons, Erik; Seth A. Erbe  
**Subject:** meet & confer

Carmine,

Per our conversation yesterday, please be informed as follows:

Request No. 5 seeks market research, reports or analysis regarding customer behavior with respect to the purchase of Edys take home ice cream products such as

- customer response to price changes;
- customer purchase decision process;
- customer brand loyalty;
- customer response to temporary price reductions;
- customer response to in-store promotions.

In addition, the request includes market research, reports or analysis of retail scan data to evaluate price elasticity.

In addition to the limitations in my March 21, 2008, letter, plaintiff agrees to limit these requests to documents maintained by Dryer's Marketing Division and not extend to regional offices throughout the country. The time period for these requests is January 1, 2003 to December 31, 2006.

In the event we are not able to reach agreement, please advise me when you would like to meet and confer in person tomorrow.

Regards,

Dave

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# EXHIBIT E



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March 21, 2008

VIA E-MAIL KOONSE@HOWREY.COM

Erik T. Koons  
Howrey LLP  
1299 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2402

RE: Sterling Merchandising, Inc. v. Nestlé, S.A. et al.  
U.S. District Court, District of Puerto Rico, Case No. 06-CV-1015  
File No.: 080369-0001

Dear Mr. Koons:

I am writing to confirm our March 21, 2008, discussions regarding Dreyer's response to Sterling's subpoena and my December 21, 2007, letter to Mr. Zarlenga.

In an attempt to resolve concerns outlined in my letter to Mr. Zarlenga, we discussed Sterling's position that Dreyer's document production and Mr. Collett's preparation were deficient with regard to document Request Nos. 5 and 6 and Deposition Topic Nos. 8, 9, and 11 and Dreyer's objections and concerns regarding same.

As a result of our discussion, I agreed to limit the scope of these requests to marketing reports and analysis regarding Edy's brand products, but declined to adopt geographic limitations. I also indicated that these requests related to the final reports and analysis and did not seek underlying data, correspondence or email.

Finally, I agreed to consider further reasonable limitations in the event responding to these requests posed specific concerns for particular responsive information.

I understand that you will be considering this further and advise me of Dreyer's position in the near future.

Very truly yours,

GODFREY & KAHN, S.C.

David J. Gilles

DJG:kap

cc: Seth A. Erbe  
Carmine R. Zarlenga  
Luis A. Oliver